

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY,
AS SHE IS THE ADMINISTRATRIX OF
THE ESTATE OF AWILDA SANTIAGO,
ESSEX PROBATE COURT DOCKET
#03P-2499AD1, P/P/A VERONICA
ROSARIO AND CHRISTINA SANTIAGO,
AND AS SHE IS THE ADMINISTRATRIX
OF THE ESTATE OF JOSE SANTIAGO,
BERLIN (CONNECTICUT) PROBATE
COURT, CASE #03-0713

Plaintiff

v.

RARE HOSPITALITY INTERNATIONAL,
INC. d/b/a LONGHORN STEAKHOUSE

Defendant


Civil Action Number:
05-CV-10617MLW

**DEFENDANT'S MOTION TO EXCLUDE THE EXPERT OPINION OF
DAVID BENJAMIN, PH. D.**

NOW COMES the defendant, RARE Hospitality International, Inc. d/b/a LongHorn Steakhouse and pursuant to Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Douillard v. LMR, Inc.*, 433 Mass. 162 hereby respectfully requests that this Honorable Court exclude the opinions of plaintiffs' expert David Benjamin, Ph.D. ("Dr. Benjamin").

In support of said Motion, the defendant refers the Court to "Defendant's Memorandum in Support of its Motion to Exclude the Expert Opinion of David Benjamin, Ph. D.", attached hereto and incorporated herein.

The Defendant,
By Its Attorneys,



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**DEFENDANT’S MEMORANDUM IN SUPPORT OF ITS MOTION TO EXCLUDE THE
EXPERT OPINION OF DAVID BENJAMIN, PH. D.**

This Court should exclude the opinions of David Benjamin, Ph.D. (“Dr. Benjamin”) under Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Douillard v. LMR, Inc.*, 433 Mass. 162 (2001). Dr. Benjamin was retained to provide testimony on the critical element of Plaintiffs’ dramshop action against the Defendant RARE Hospitality International, Inc., d/b/a, LongHorn Steakhouse (“LongHorn”). Specifically, Dr. Benjamin’s opinions and reconstruction are the only evidence Plaintiffs can offer that Mr. Jeffrey Southworth (“Southworth”) was “visibly intoxicated” at the time he was served his last drink at the LongHorn on the night he was in an accident that killed Jose and Awilda Santiago and injured Christina Santiago and Veronica Rosario. Dr. Benjamin’s opinion, however, should be excluded because the opinion is not based on sufficient facts as required for the admission of

expert testimony in a Massachusetts and/or Federal dramshop action, his methodology is not based on acceptable standards within the scientific community, and his selective ignorance of facts and multiple disparate conclusions render his opinions patently unreliable.

First, Dr. Benjamin's opinion concerning Mr. Southworth's likely blood alcohol concentration ("BAC") is not accompanied by any admissible evidence of either Mr. Southworth's typical reactions to alcohol or that Mr. Southworth displayed signs of visible intoxication on the night in question. No Massachusetts court has ever permitted an expert to opine concerning visible intoxication in a dramshop accident without such additional evidence. See *Douillard v. LMR*, 433 Mass., 162 166 (2001). Second, Dr. Benjamin relies upon facts not typically relied on by experts in this field by ignoring all of the eyewitness testimony elicited during discovery in this action and instead uses inadmissible hearsay to reconstruct Mr. Southworth's likely BAC. Third, Dr. Benjamin's opinions misapply the industry standard "Widmark Formula" for calculating BAC by employing an unaccepted lower body mass constant and lower absorption rate solely to artificially create a higher BAC. Finally, Dr. Benjamin has inexplicably provided three vastly disparate opinions in this case concerning Mr. Southworth's likely BAC, all based on nearly identical information, rendering his opinion patently unreliable. Despite all of the above, Dr. Benjamin's opinions still do not place Mr. Southworth's likely BAC at a level at which Dr. Benjamin would expect Southworth, a tolerant drinker, to show visible signs of intoxication. His unreliable opinions will only confuse, not assist, the finder of fact.

I. BACKGROUND FACTS

On September 26, 2003, after dirt bike riding, Jude Connelly ("Connelly"), Scott Espey and Southworth drove to the LongHorn for dinner, arriving at approximately 8:00 p.m. *Transcr. Depo. Jude Connelly* (Exhibit 1) 10:18-19. While en route, they invited Michael Espey (brother

of Scott), William “Todd” Currie (“Currie”), Matthew Cenicola (“Cenicola”) and Bruce Sirjane (“Sirjane”), to join them at LongHorn. *Transcr. Depo. Michael Espey* (Exhibit 2) 37:22-24, 38:1-9. Connelly, Southworth and Scott Espey waited in the bar area until the remainder of their party arrived. *Transcr. Depo. Scott Espey* (Exhibit 3) 19:17-24; 21:13-16; *Transcr. Depo. Jude Connelly* 37:10-15. There is testimony that while at the bar, Southworth ordered a 25 ounce beer which he did not finish. *Transcr. Depo. Scott Espey* 20:3-10; *Transcr. Depo. Jude Connelly* 12:3-10. Southworth brought this beer with him from the bar to the table. *Transcr. Depo. Jude Connelly* 144:20-24.

At approximately 8:30 p.m., the Southworth party, now seven in total (Southworth, Connelly, Michael Espey, Scott Espey, Currie, Cenicola and Sirjane), were seated at their table. *Transcr. Depo. Jude Connelly* 74:16-24, 75:1-9. After taking the party’s orders, LongHorn server Leigh Chabot (“Chabot”)¹ logged in an order of appetizers as well as three Jack Daniels Manhattans (“Manhattan”) (2.0 oz. of Jack Daniels and 0.25 oz. of sweet vermouth per LongHorn recipe book)² and one 25 oz. beer. *Audit Report* (Exhibit 5) p. 7-8. These drinks were served to Michael Espey, Currie, Cenicola and Sirjane. *Transcr. Depo. Leigh Chabot* 69:25, 70:1-8 (Exhibit 6).³ After receiving their appetizers, at 8:51 p.m., the Southworth party ordered a round of seven Manhattans. *Audit Report* p. 8. Each member of the party consumed one beverage from that round. *Transcr. Depo. Kristin O’Donnell (Part II)* 8:23-24, 9:1-2 (Exhibit 8); At 9:00 p.m., Chabot entered dinner orders for the Southworth party, all steaks or ribs with side

¹ At the time of this accident, server Leigh Chabot was an experienced waitress having worked in said capacity for five years total, three years specifically at the LongHorn.

² See RARE Hospitality Bar Recipe Book (Exhibit 4).

³ Plaintiffs’ expert, Michael Marcantonio (“Marcantonio”), also opined that, based on his training and experience, as well as his review of the facts, Southworth did not receive a drink from this first round ordered by the table. *Transcr. Depo. Michael Marcantonio (Part I)* 104:1-7. (Exhibit 7).

orders and salads. *Audit Report* p. 8-9. At 9:15 p.m., a 25 oz. beer was ordered for someone at the table. *Audit Report* p. 9. It was consumed by someone other than Southworth. *Transcr. Depo. Leigh Chabot* 122:19-21. At 9:21 p.m. and 9:24 p.m., a final round of seven Manhattans was ordered for the table. *Audit Report* p.9-10. Each patron at the table had one Manhattan from the final round. *Transcr. Depo. Leigh Chabot* 95:5-8; 167:10-25, 168:1⁴

When Southworth was served his last drink, he did not exhibit any signs of visible intoxication. Just prior to this round, Manager Noonan informed bartender Kristin O'Donnell that he observed the table and that everyone seemed fine. *Transcr. Depo. Kristin O'Donnell (Part II)* 11:7. Connelly testified that Southworth did not exhibit signs of visible intoxication when served his last drink. *Transcr. Depo. Jude Connelly* 53:6-9⁵. Scott Espey was with Southworth from the afternoon onward and did not recall Southworth being under the influence of alcohol when he was served his last drink at the LongHorn.⁶ *Transcr. Depo. Scott Espey* 36:7-10. Chabot is certain that Southworth did not exhibit any visible signs of intoxication at the time he was served his last drink. *Transcr. Depo. Leigh Chabot* 175:6:10. Both Connelly and Chabot watched Southworth rise from the table and walk to the bathroom, and Southworth was steady on his feet. *Transcr. Depo. Jude Connelly* 157:4-24, 158:1-6; *Transcr. Depo. Leigh Chabot* 150:13-24.

After leaving the LongHorn, Southworth continued drinking at a local hotel. *Transcr. Depo. Scott Espey* 123:13-20. The group then proceeded to a strip club. *Transcr. Depo. Jude Connelly* 123:13-15. After leaving the strip club, Southworth, while traveling south on Route

⁴ See also Marcantonio's report concurring that, based on his training and experience, the two orders of Manhattans three minutes apart totaling seven Manhattans comprised one drink for each patron at the table. *Transcr. Depo. Michael Marcantonio (Part I)* 183:1-16.

⁵ Prior to civil litigation commencing, Connelly gave similar testimony before the Grand Jury. *Grand Jury Testimony Jude Connelly* 20:1-4 (Exhibit 9).

⁶ It should be noted that the standard in Massachusetts is not whether Southworth was "under the influence" of intoxicating beverages, but rather, whether he was "showing visible signs of intoxication" at the time he was served his last drink. See p. 6 *supra*.

495, collided with Santiago's vehicle. *Collision Report* (Exhibit 10) p.1-3. Plaintiffs brought an action against Southworth ("Southworth action") and settled the action for \$300,000. *Transcr. Depo. Nancy Rosario* 98:7-11 (Exhibit 11). Plaintiffs now bring this action seeking damages for the same injuries claimed in the Southworth action.

II. LEGAL STANDARDS

A. STANDARD FOR DRAM SHOP CASES

To recover against Longhorn, Plaintiffs must prove that (1) Southworth was a patron on the premises; (2) he was served intoxicating liquor; (3) Longhorn served Southworth while he was visibly intoxicated; (4) Longhorn knew or should have known that Southworth was visibly intoxicated; (5) Southworth operated a motor vehicle while intoxicated; (6) the operation of a vehicle was reasonably foreseeable by Longhorn; (7) a person of ordinary prudence would not have served Southworth; and (8) the imposition of liability was not broken by the driving of an automobile as an intervening, superseding event because it was within the scope of foreseeable risks. *Cimino v. Milford Keg, Inc.*, 385 Mass. 323 (1982).; see also *Wiska v. St. Stanislaus Social Club, Inc.*, 7 Mass.App.Ct. 813, 816 (1979).

In *Vickowski v. Polish American Citizens Club of the Town of Deerfield, Inc.*, 422 Mass. 606, 609 (1996), Massachusetts reaffirmed its long held precedent that to meet their burden, plaintiffs must prove visible signs of intoxication at the time the defendant last served alcohol to the patron. Even if witnesses at the scene of the accident indicate that the operator was visibly intoxicated at the accident scene, one cannot infer "similar apparent signs of intoxication a half-hour and one beer earlier." *Id.* at 609. In fact, "this particular leap, unsupported by additional probative evidence, direct or circumstantial . . . would not permit a reasonable inference to a

sufficient degree of probability and would, in effect, impose liability on the basis of unacceptable speculation on the part of the jury.” *Id.* at 610. In *Douillard v. LMR, Inc.*, 433 Mass. 162 (2001), the Court allowed the fact finder to infer visible signs of intoxication from an expert’s opinion as to the patron’s BAC only when the opinion was coupled with “specific information concerning this particular drinker’s reaction to alcohol consumption.” *Douillard*, 433 Mass. at 167. To satisfy Plaintiffs’ burden, however, the expert would have to opine that the drinker’s BAC was such that “one would expect to see signs of intoxication at the blood alcohol level... reached [by the drinker],” and that opinion would require confirmatory evidence that the drinker customarily exhibited visible signs of intoxication at that BAC. *Douillard* at 167.

B. STANDARD FOR EXPERT TESTIMONY

Evidence must be relevant to the facts of the case to be admissible. It must make a fact “more probable or less probable than it would be without the evidence.” Fed R. Evid. 401. The same is true for experts. Fed R. Evid. 702 mandates that before admitting expert testimony, the Court must determine whether the proffered testimony will assist the trier of fact.

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702.

Trial courts must act as gatekeepers in screening proffered expert testimony for relevance and reliability. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-593 (1993); *see also Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147 (1999). After *Daubert*, federal judges ruling on expert witness testimony face a far more daunting task as they must engage in a two part analysis. First, the Court must determine whether the expert’s testimony reflects “scientific knowledge,” whether their findings are “derived from the scientific method,” and whether their

work product amounts to “good science.” *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). The second prong of the analysis requires the Court to “ensure that the proposed expert testimony is ‘relevant to the task at hand’ ... *i.e.* that it logically advances a material aspect of the proposing party’s case.” *Id.* at 1316. The second part of the analysis is referred to as the “fit” requirement. *Id.* This “fit” requirement goes primarily to relevance, however, it is not limited to the general relevancy requirements of Rule 402. Rather, the expert testimony “carries special dangers to the fact-finding process because it ‘can be both powerful and quite misleading because of the difficulty in evaluating it.’” *Id.* n. 17, (*citing Daubert*, 113 S. Ct. at 2798). Courts must therefore exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case will not mislead the jury. *Id.*

More importantly, even if the subject matter requires expert testimony, and the expert proposes to rely upon research characterized by rigorous application of the scientific method, the expert’s opinions will only be admissible if it is “sufficiently tied to the facts of the case that it will aid the [fact finder] in resolving a factual dispute.” *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000) (a “theory that might meet certain *Daubert* factors ...[still] should not be admitted if it does not apply to the specific facts of the case.”) (quoting *Daubert*, 509 U.S. at 591), *cert. denied*, 531 U.S. 979 (2002); *cf.* *United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) (“Relevant expert testimony is admissible only if an expert knows of facts which enable him to express a reasonably accurate conclusion.”).

Requisite credentials alone are not enough to render an expert’s opinion admissible. *Clark v. Takata Corp.*, 192 F.3d 750, 759 n. 5 (7th Cir. 1999) (“A supremely qualified expert cannot waltz into the courtroom and render opinions unless those opinions are reliable and

relevant under the tests set forth by the Supreme Court in *Daubert*"). The District Court must in keeping with its gatekeepers duty, assess the reliability of the methodology of the expert is employed in arriving at an opinion. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7th Cir. 2005).

III. ARGUMENT

A. Dr. Benjamin's opinion that Mr. Southworth was "visibly intoxicated" when served his last drink at LongHorn does not rely on any evidence of Southworth's typical reaction to alcohol consumption and therefore should be excluded.

No Massachusetts court has ever permitted an expert to opine concerning a patron's "visible intoxication" in a dramshop accident without also providing additional, admissible evidence that the patron was, in fact, visibly intoxicated or that the patron typically exhibited visible intoxication when consuming like amounts of alcohol. *Douillard v. LMR, Inc.*, 740 N.E.2d 618, 623 (Mass. 2001). In this case, the Plaintiffs can do neither. No eyewitness recalls any sign of intoxication from Southworth prior to being served his last drink at Longhorn. Plaintiffs have provided no evidence that Southworth's would typically exhibit signs of visible intoxication after consuming the amount of alcohol served to him at the Longhorn. To the contrary, Dr. Benjamin openly admits that Southworth was not an average drinker but rather "he was a frequent alcohol consumer and would have been likely to demonstrate some tolerance to the intoxicating effects of ethanol." *Rule 26 Report of David Benjamin* (Exhibit 12), p. 13. Benjamin opines that only 20-30% of tolerant drinkers would exhibit visible signs of intoxication at the much higher BAC of 0.20, well above the BAC he assigns to Southworth, and significantly higher than the BAC of 0.15 at which non-tolerant drinkers would be expected to show visible signs of intoxication. *Transcr. Depo. David Benjamin (Part II)* 93:14-19 (Exhibit 13).

Massachusetts does not permit Plaintiffs to fill the evidentiary gap with Dr. Benjamin's opinion as to Southworth's likely BAC without additional, "direct evidence of the defendant's

own reactions to alcohol to confirm that they are in fact comparable to the average drinker.” *Douillard v. LMR, Inc.*, 740 N.E.2d 618, 623 (Mass. 2001); *Kirby v. Morales*, 741 N.E.2d 855, 861 (Mass.App.Ct. 2001). (“[I]n the absence of evidence of Morales’s own reactions to excessive consumption, the expert’s opinion testimony was properly excluded.”) (internal citations omitted). In *Douillard*, for example, the expert’s opinion was only allowed because plaintiff provided additional factual testimony of a witness who had seen the patron intoxicated on at least ten prior occasions as well as the patron’s own testimony about the amount of alcohol it took to render him intoxicated. *Id.* 620, 622 (“This record adds to the expert opinion specific information concerning this particular drinker’s reaction to alcohol consumption.”) There, the Court vacated summary judgment stating: “the plaintiff’s case does not rest solely on an expert’s assessment of how the ‘average’ drinker would react to this much alcohol.” *Douillard* 622-23; see also *Hopping v. Whirlaway, Inc.*, 637 N.E.2d 866, 869 (Mass. App. Ct. 1994) (after ordering a new trial, the Appeals Court said “plaintiffs ought not to be permitted to put to their toxicologist witness hypothetical questions which ask him whether [patron] would have been recognizably intoxicated if he had shown difficulty walking unless evidence is received that Regan, in fact, had demonstrated difficulty in walking.”).

Absent any evidence of Southworth’s reaction to alcohol consumption, Dr. Benjamin cites testimony from Plaintiffs’ prior lawsuit against Southworth for his conclusion that Southworth was “more loud than usual”, did not “carry himself” normally, or “maybe” had “glassy” eyes. This factual testimony is inadmissible in this action, and therefore cannot satisfy Plaintiffs’ burden. Barring evidence of Southworth’s actual visible intoxication or typical reactions to alcohol, Massachusetts precedent requires that Dr. Benjamin’s report be stricken and the testimony excluded.

B. Benjamin's opinions are unreliable because they are based solely and selectively on inadmissible hearsay, and ignore all of the admissible, eyewitness testimony in this case.

The parties have conducted extensive discovery in this case, including depositions of eyewitnesses present on the night in question. In forming his opinion that Mr. Southworth was "visibly intoxicated" at the Longhorn, however, Dr. Benjamin discounted and disregarded all of the testimony in this case. *Rule 26 Report David Benjamin* p.3-4. He instead chose to rely on inadmissible statements elicited by the plaintiffs in their prior lawsuit against Mr. Southworth, an action in which LongHorn had no chance to participate or cross-examine any witness. *Id.* In that regard, Dr. Benjamin's opinions are simply an attempt by Plaintiffs to offer inadmissible hearsay evidence under the guise of expert testimony.

Dr. Benjamin bases his opinions exclusively upon the testimony in the Southworth action, the depositions and statements of Jude Connelly (Aug. 19, 2004), Thomas Scott Espey (June 22, 2004), and Michael Espey (June 22, 2004). *Rule 26 Report David Benjamin* p.3-4. By contrast, Dr. Benjamin summarily dismissed the sworn testimony of the same witnesses taken in this action, in which LongHorn cross-examined the witnesses. *Rule 26 Report David Benjamin* p.3-4; *Transcr. Depo. David Benjamin (Part I)* 24:15-24, 25:1-6. (Exhibit 14). Even more troublesome, and telling, is Dr. Benjamin's failure to review, or even consider, the testimony in this action of percipient witnesses not deposed in the Southworth action, specifically, Leigh Chabot (waitress who served Southworth's party); Kristin O'Donnell (bartender working that evening), Patricia Kreidler (bartender working that evening) Sherri Salmond (regular server to Southworth who observed him that evening), Chuck Noonan (manager that evening who observed the Southworth table), and William Todd Currie (member of the Southworth party). Dr. Benjamin acknowledged that this evidence "may have been" important. *Transcr. Depo. David Benjamin (Part I)* 31:15-24; 32:1-12. At deposition, however, Dr. Benjamin admitted that

his opinion was not based on his own independent evaluation of the facts, but rather on the limited facts and assumptions supplied to him by Plaintiffs' counsel. *Transcr. Depo. David Benjamin (Part II)* 58:12-18.

Clearly statements and deposition testimony elicited by Plaintiffs in the Southworth action are inadmissible hearsay in this action against Longhorn. Fed.R.Evid. 801, 802. In *Kirby*, on facts identical to those present in this case, the Court held that statements of the allegedly intoxicated patron made during a deposition at which Defendant had no opportunity to attend were inadmissible. *Kirby v. Morales*, 741 N.E.2d 855, 859-60 (Mass. App. 2001) ("because the Lounge had no notice of the first deposition as it was not then a party, Morales' statements from the first deposition could not be used against it").

Fed.R.Evid. 703 provides a single, narrow exception to the general rule that expert opinions must rely upon admissible evidence. *See generally* P.J. Liacos, Massachusetts Evidence §§ 7.10.2-7.10.3 (6th ed. 1994 & Supp.1995); *Comm. v. Roman*, 606 N.E.2d 1333, 1335 (Mass. 1993); *Comm. v. Waite*, 665 N.E.2d 982, 990 (Mass. 1996). Specifically, Rule 703 allows an expert to base an opinion on inadmissible facts or data only if the facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The exception is purposefully narrow: "This part of the rule is designed to prevent enlarging the category of permissible data to break down the rules of exclusion unduly. It is especially important when the facts or data on which the expert seeks to rely have obvious characteristics of unreliability." *Riccardi v. Children's Hospital Medical Center*, 811 F.2d 18, 25 (1st Cir. 1987) (internal citations omitted). Plaintiffs bear the burden of establishing that Benjamin's factual basis for his opinions are the type that toxicologists would rely upon in forming their opinions and inferences. *Daubert*, 509 U.S. 579, 592 n.10 (1993).

The Rule 703 exception for inadmissible evidence is not intended to allow an expert to reconstruct past events by ignoring admissible evidence in favor hearsay testimony. No court has ever permitted such an exercise in deception. In fact, the 1972 committee notes to Rule 703 specifically state that an “accidentologist” should not be permitted to provide his opinion as to an accident reconstruction based on the hearsay statements of bystanders because such evidence does not meet the standard. Instead, the standard “reasonably relied on by experts in the particular field” is meant to cover, e.g., a physician’s opinion as to diagnosis, etc. see also *Manocchio v. Moran*, 919 F.2d 770, 780 (1st Cir. 1990) (admitting expert opinion of medical examiner despite reliance on reports by others because “physicians commonly base their opinions on tests and examinations performed by other physicians: for example, the reading of an x-ray by a radiologist”); *Int’l Adhesive Coating Co. v. Bolton Emerson Int’l, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988) (“[damages expert] testified that he derived his damage estimates by reviewing [party]’s business and financial records and through interviews with company personnel. We think it obvious that these are sources of information normally and reasonably relied upon by accountants.”); *American Universal Insurance Co., et al. v. Falzone*, 644 F.2d 65, 66 (1st Cir. 1981) (“it is reasonable for one state fire marshal to rely on the contemporaneous and on-the-scene opinions of other investigators on his team”).

Hearsay and counsel’s assumptions are not facts or data “reasonably relied upon by experts” as contemplated by Rule 703, particularly in this case where Dr. Benjamin has available to him a wealth of admissible eyewitness testimony. To the contrary, toxicologists typically rely upon known BAC levels combined with the drinker’s known reaction to alcohol,⁷ which

⁷ If the drinker in question has a known BAC at a certain point in time, toxicologists can employ a mathematical formula to determine what the drinker’s BAC would have been at some point earlier. Since there is no known BAC in this case, Benjamin cannot employ this method, which is called back extrapolation or retrograde extrapolation. “Retrograde extrapolation is a mathematical calculation used to estimate a person’s blood alcohol level at a particular point in time by working backward from the time the blood alcohol level was tested and factoring in rates of absorption and excretion.” *Commonwealth v. Colturi*, 448 Mass. 809, n.2 (2007) quoting from *Commonwealth v. Senior*, 433 Mass. 453, 459 (2001).

evidence would include eyewitness testimony in this action. Benjamin's reliance upon hearsay from prior cases in lieu of the sworn testimony of eyewitnesses in this case, as well as the lack of any BAC reading for Southworth, are not facts upon which toxicologists reasonably rely.

In at least five critical factors, Dr. Benjamin's opinions are not supported by the evidence in this action and will only confuse the finder of fact. *United States v. Wilson*, 798 F.2d 509, 517 (1st Cir. 1986). First, Dr. Benjamin assumes that Mr. Southworth consumed two 25 oz. beers at the LongHorn bar before sitting down for dinner where the evidence elicited shows Mr. Southworth consuming only one. *Transcr. Depo. Jude Connelly* 12:3-10. Second, Dr. Benjamin's assumption that Mr. Southworth consumed another 25 oz. beer at 8:50 p.m. is unsubstantiated and contrary to the testimony of eyewitnesses. *Transcr. Depo. Leigh Chabot* 122:19-21. (See also Plaintiffs' own expert, Michael Marcantonio, who concludes the same.) *Transcr. Depo. Michael Marcantonio (Part I)* 104:1-7. Third, Dr. Benjamin finds Southworth consuming a beer at 9:20 p.m., however, no testimony in this case attributes this beer to Southworth. Contrarily, Chabot remembers that she did not serve Southworth a beer at the table. *Transcr. Depo. Leigh Chabot* 122:19-21.

Fourth, Dr. Benjamin assumes that Southworth consumed two Manhattans from the final round of seven drinks ordered by the table at 9:21 and 9:24 p.m.⁸ No one in this action has testified to this, and even Plaintiffs' other liability expert does not find this to be credible as he concluded that each person at the table, including Southworth received one drink each from this final round. *Transcr. Depo. Michael Marcantonio (Part I)* 183:1-21. (See also *Transcr. Depo. Leigh Chabot* 95:5-8; 167:10-25, 168:1.) Lastly, Plaintiffs themselves state that one of the two beers served to the table that evening was served to Michael Espey, yet Benjamin opines that

⁸ At 9:21 and 9:24 p.m., the Southworth party ordered seven Manhattans total, consisting of one "round" of drinks.

Southworth drank both beers served to the table that evening. See *Nancy Rosario's Answers to Interrogatories* p.14 (Exhibit 15); *Rule 26 Report of David Benjamin* at p.6.

Benjamin's testimony is clearly guesswork and speculation. When affirming exclusion of testimony, the First Circuit Court of Appeals stated "there was no evidence in the record to support the central assumption upon which it would be based. Thus, we agree with the district court that the testimony was excludable as guesswork, conjecture and speculation that would serve only to confuse the jury." *United States v. Wilson*, 798 F.2d 509, 517 (1st Cir. 1986). See also *Ricciardi v. Children's Hospital Medical Center*, 811 F.2d 18, 24 (1987) (An expert's report or opinion should be excluded "when the facts or data on which the expert seeks to rely have obvious characteristics of unreliability"). As gatekeeper, the Court must "ensure that the proposed expert testimony is 'relevant to the task at hand'... *i.e.* that it logically advances a material aspect of the proposing party's case." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995). The Court must be satisfied that the factual basis of Dr. Benjamin's opinion "fits". *Id.* This "fit" requirement it is not limited to the general relevancy requirements of Rule 402 but rather, the expert testimony "carries special dangers to the fact-finding process because it 'can be both powerful and quite misleading because of the difficulty in evaluating it.'" *Id.* n. 17, (citing *Daubert*, 113 S. Ct. at 2798).

Where Dr. Benjamin's opinion is not supported by the facts of the case, in fact they contradict them, his opinion is inherently unreliable and should be excluded. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993). An expert cannot rely upon unreliable facts or data. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994). There must be a connection between the expert's testimony and the facts elicited. *United States v. Shay*, 57 F.3d

126,132-133 (1st Cir. 1995). Where his fundamental assumptions are unsupported by the evidence, admissible or inadmissible, Dr. Benjamin's opinions should be excluded.

C. Dr. Benjamin's latest opinion is inherently unreliable because, applying the same set of facts, he has arrived at three vastly different conclusions.

In his Rule 26 Report, dated October 31, 2006, Dr. Benjamin opines that Mr. Southworth's BAC at the time of his last service was 0.149 and that Southworth was served his last drink at 9:35. By contrast, in his 60J Affidavit, filed more than a year prior to his Rule 26 Report and based on the same set of facts, Dr. Benjamin opined that Mr. Southworth's BAC at the time of last service at the LongHorn was higher than his report in this action, and he concludes that Southworth was served his last drink at 9:25 p.m.⁹ Had Benjamin's calculations for the Rule 26 report used as the time of last service, 9:25 p.m., as he did in his 60J Affidavit, Southworth's BAC would have been 0.1346. Both conclusions, 0.149 and 0.1346, are below the standard in the toxicology field at which a non-tolerant drinker would likely show visible signs of intoxication (0.150). *Liquor Liability Update 2006*, MCLE p.98 (Exhibit 16). Both were also well below the BAC of 0.20, the level at which Benjamin opines that only 20-30% of tolerant drinkers like Southworth would exhibit visible signs of intoxication. *Transcr. Depo. David Benjamin (Part II)* 93:14-19. In other words, according to Benjamin's various reports and readings, Southworth would not have been visibly intoxicated to a reasonable degree of scientific certainty when served his last drink at the LongHorn on September 26, 2003.

After being deposed in this action in January 2007 and approximately four months after submitting his Rule 26 report, Dr. Benjamin again changed his opinion. He now opines that Mr. Southworth's BAC at the time of last service was 0.1889. See *Supplement to David Benjamin*

⁹ While Benjamin had new material at his disposal following his submission of the 60J Affidavit, since he chose to ignore all discovery elicited in the instant action, he relies on the same set of facts he used previous. See pp. 9-10 *infra*.

Ph.D. 's Report(Exhibit 17).¹⁰ In order to render his opinion, Dr. Benjamin conveniently doubles the volume of alcohol attributed to each drink, an assumption for which there is no factual basis. *Supplement to David Benjamin Ph.D. 's Report* at 1. Without any empirical evidence or eyewitness testimony, Dr. Benjamin guesses at the volume of liquid in the glass based on a picture of what Plaintiffs' purport to be a LongHorn Manhattan taken years after the events in question. Even this last attempt to salvage a favorable opinion for the Plaintiffs falls below the measure at which Southworth would more likely than not show visible signs of intoxication.

The disparity of these three opinions, all based on the same facts, materials reviewed, and calculations, all sworn to under the pains and penalties of perjury, establishes conclusively that Dr. Benjamin's methodology and opinion(s) is/are too unreliable to be admitted. Additionally, in all three varying opinions, Dr. Benjamin concludes "to a reasonable degree of scientific certainty" that Mr. Southworth consumed three different amounts of alcohol. In his 60J Affidavit, he concludes that Southworth consumed the equivalent of 12 beers at the LongHorn. *60J Affidavit of David Benjamin* at p.13 (Exhibit 18). In the first Rule 26 report, it was 13 beers. *Rule 26 Report of David Benjamin* at 2. In the Supplemental Rule 26 report, after his opinion was exposed at deposition, Dr. Benjamin attempted to change his opinion to 26 beers. Dr. Benjamin's opinions, in addition to contradicting himself, contradict the plaintiffs themselves as well as Plaintiffs' other expert, Marcantonio.¹¹ For example, in his 60J Affidavit, Dr. Benjamin assigns four 25 oz. beers to Mr. Southworth at the table. See *60J Affidavit* at 6. The evidence is clear, however, that only two beers were served to the entire table that evening. See *Audit Report*. Plaintiffs themselves have admitted that Michael Espey consumed at least one of the

¹⁰ This supplement to Dr. Benjamin's report is being challenged in a separate Motion to Strike.

¹¹ Marcantonio attributes two 25 oz. beers and 2-3 Manhattans to Jeffrey Southworth over the course of the evening. *Transcr. Depo. Michael Marcantonio* at p.72.

two beers served to the table. See *Plaintiffs' Answers to Interrogatories*. Server Chabot remembers that Southworth did not consume any beer at the table. *Transcr. Depo. Leigh Chabot* 122:19-21.

Expert opinions must be sufficiently reliable and relevant to assist the trier of fact. *Daubert*, 509 U.S. at 592. Massachusetts' "ultimate test" of the Court's gatekeeping inquiry is whether "the process underlying the expert's testimony" is reliable. *Commonwealth v. Lanigan*, 419 Mass. 15, 26 (1994). Benjamin's disparate opinions are not sufficiently reliable to assist the fact finder. Three contradictory conclusions would clearly confuse any finder of fact. The process he employs to arrive at his conclusions (i.e. hypotheticals assumptions presented by plaintiffs' counsel unsupported by the evidence) is not a reliable process and therefore should be excluded.

D. Benjamin misapplies the scientifically accepted Widmark Formula by altering the accepted body mass ratio and food absorption rate

To calculate Southworth's BAC, Benjamin employs the "Widmark Formula." Dr. Benjamin, however, misapplies the formula by altering the accepted standard for body mass (the "r" factor) and absorption rate for someone consuming food while drinking. Dr. Benjamin's misapplication deviates from the accepted standard within the scientific community, as well as Benjamin's own published works. See *Liquor Liability Update 2006*, MCLE, p.108-112. These deviations inflate Southworth's BAC and render Dr. Benjamin's calculation unreliable.

Dr. Benjamin consistently writes and testifies that the industry accepted absorption rate for alcohol for someone who is eating food is between 60-90 minutes. *Liquor Liability Update 2006*, MCLE p. 108, *Transcr. Depo. David Benjamin (Part I)* 152:9-14. Benjamin teaches, publishes and testifies that the "r" factor, which represents body mass, for purposes of the

Widmark formula is 0.68 for men and 0.55 for women.¹² *Liquor Liability Update 2006*, MCLE p. 112; *Transcr. Depo. David Benjamin* 144:13-23. Despite his own accepted standards for determining BAC, Benjamin altered his calculations in this case by reducing the “r” factor to 0.64 and shortening the absorption time to 30 minutes. *See Rule 26 Report* at 16-17. Benjamin himself admits he has no scientific basis, based on literature or standards accepted in the forensic toxicology field, that would assign a .64 Widmark “r” to Southworth, a 6’4, 210 pound male. *Transcr. Depo. David Benjamin (Part I)* 148:16-22.

Misapplying these factors substantially and artificially inflates Southworth’s BAC by accelerating the rate at which the alcohol enters Southworth’s system,, and then magnifying the effect of that alcohol. Had Dr. Benjamin employed the Widmark formula appropriately, he would have calculated a BAC for Southworth of 0.1153 instead of 0.149 at 9:35 p.m.¹³ *See Widmark Chart* (Exhibit 19). Benjamin’s opinions as to Southworth’s BAC are thus thrice inflated: inflated as to the amount of alcohol Southworth imbibed, the effect of the alcohol, and how quickly it would affect Southworth. Even with the inflated amount of alcohol attributed to Southworth, had the Widmark formula been properly applied, not only would Southworth’s BAC fall well below the accepted scientific standard at which non-tolerant drinkers would likely exhibit visible signs of intoxication, but it would fall almost 50% lower than the BAC at which less than a third of tolerant drinkers would be expected to show visible signs of intoxication. *Transcr. Depo. David Benjamin (Part II)* 93:14-19.

For Dr. Benjamin’s opinion to be admitted under *Daubert*, plaintiffs must prove that: a) the methodology is scientifically valid; and b) it can be properly applied to the facts of the case.

¹² Women have a lower BAC number because generally women have a higher body fat component than men. This is significant because the lower the “r” factor, the higher the BAC.

¹³ This calculation assumes the inflated drink totals attributed to Southworth which RARE does not adopt.

Vasallo v. Baxter Health Corp., 428 Mass. 1, 14 (1998). Dr. Benjamin's opinion fails both prongs of the test. He fails to point to any scientifically valid basis for assigning a Widmark "r" of .64 to Southworth, nor can he validate his hypothesis that Southworth's food absorption was 30 minutes until 9:20 p.m., despite having consumed bread, appetizers, salads, side orders, and beef. His testimony should be stricken as it is not sufficiently reliable to aid the fact finder.

V. CONCLUSION

Dr. Benjamin's Rule 26 report and expected testimony fail the test outlined by Fed.R.Evid. 702 for admission of expert testimony. Dr. Benjamin ignores pertinent testimony in this case in favor of legal argument and hearsay. His opinions confuse, not assist, the fact finder. Dr. Benjamin's testimony is not sufficiently reliable, reaching three vastly different conclusions based on the same facts. Dr. Benjamin admits that his assumptions are based on hypotheticals supplied to him by Plaintiffs' counsel and not based on his independent evaluation of the facts. Dr. Benjamin misapplies the Widmark formula to reach an inflated BAC by altering the body mass factor and utilizes a food absorption rate that conflicts with his own, scientifically accepted, standard. Despite these glaring errors and omissions, Dr. Benjamin, calculates Southworth's BAC at below the accepted standard at which a non-tolerant drinker would likely exhibit visibly signs of intoxication and well below where Southworth, a tolerant drinker, might possibly show such signs. His opinion would not assist the fact finder but rather would confuse a potential jury.

WHEREFORE, the defendant, RARE Hospitality International, Inc., respectfully requests that this Honorable Court grant its Motion to Exclude the Expert Testimony of David Benjamin, Ph. D.

The Defendant,
By Its Attorneys,



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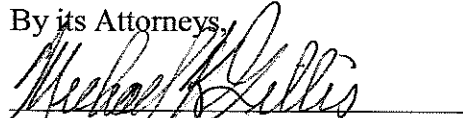
Tel. 617-244-4300

CERTIFICATE OF SERVICE

I, Michael K. Gillis, of Gillis & Bikofsky, P.C., attorneys for Rare Hospitality International, Inc., hereby certify that on May 9th, 2007, a true copy of the above document was served upon all counsel of record.

RARE HOSPITALITY INTERNATIONAL, INC. d/b/a
LONGHORN STEAKHOUSE

By its Attorneys,



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Volume: I
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Exhibits: 1-4

Page 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS *
SHE IS THE ADMINISTRATRIX OF THE *
ESTATE OF AWILDA SANTIAGO, ESSEX *
PROBATE COURT #03P-2499AD1, P/P/A *
VERONICA ROSARIO AND CHRISTINA *
SANTIAGO, AND AS SHE IS THE *
ADMINISTRATRIX OF THE ESTATE OF *
JOSE SANTIAGO, BERLIN (CONNECTICUT) *
PROBATE COURT, CASE #03-0713, *
Plaintiff, *
VS * C.A. No.
RARE HOSPITALITY INTERNATIONAL, * 05-CV-10617MLW
INC. d/b/a LONGHORN STEAKHOUSE, *
Defendant *

DEPOSITION OF JUDE CONNELLY, a witness

called on behalf of the Plaintiff, taken
pursuant to Notice under the applicable
provisions of the Federal Rules of Civil
Procedure, before Barbara J. Simon, a
Professional Shorthand Reporter and Notary
Public, in and for the Commonwealth of
Massachusetts, at the law offices of Albert L.
Farrah, Jr., One Washington Mall, Boston,
Massachusetts, on Friday, February 10, 2006,
commencing at 10:15 a.m.

SHEA COURT REPORTING SERVICES
(617) 227-3097

I N D E X

WITNESS DIRECT CROSS REDIRECT RECROSS
JUDE CONNELLY
(By Mr. Farrah) 4 171
(By Mr. Gillis) 143 172

E X H I B I T S

NO.	DESCRIPTION	PAGE
1	Floor plan	17
2	Bar bill	26
3	Written statement	42
4	Affidavit	61

(The exhibits were retained by Mr. Farrah.)

A P P E A R A N C E S

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Counsel for the Defendant

Also Present:
Neil Schnurbach, Esq.
Ann Rudy

P R O C E E D I N G S

JUDE CONNELLY, having been satisfactorily
identified and duly sworn, on oath, deposes and
says as follows:

D I R E C T E X A M I N A T I O N

BY MR. FARRAH:

Q. Just for the record, could you tell us your
name, please?

A. Jude Connelly.

Q. Mr. Connelly, my name is Albert Farrah and I
represent the plaintiff, Nancy Rosario, in
various capacities in this lawsuit.

Counsel have agreed that you will have a
copy of your transcript delivered to you and
that you will have thirty days from the date of
your receipt of that transcript to note, in
writing on a sheet of paper that will accompany
the transcript, any errors that you feel were
made in the transcription of your testimony,
and you'll need to return that errata sheet to
me within thirty days of your receipt in order

Page 5

Page

1 for the notations to have any effect in this
2 case.

3 Otherwise, your transcript will be deemed
4 accurate if we don't receive that back from you
5 within thirty days -- the errata sheet. Do you
6 understand that?

7 A. Yes.

8 Q. Tell us, please, where you live.

9 A. Harvard, Massachusetts.

10 Q. What is the address?

11 A. Fifteen Lovers Lane.

12 Q. And how old are you?

13 A. I am twenty years old.

14 Q. What is your date of birth, sir?

15 A. March 23, 1985.

16 Q. And are you currently in school?

17 A. I am.

18 Q. Where?

19 A. Fitchburg State College.

20 Q. Is that full time?

21 A. Full time.

22 Q. And do you work?

23 A. Yes.

24 Q. Where do you work?

1 A. Yes.

2 Q. Was that on September 26, 2003?

3 A. Yes, I believe so.

4 Q. Calling your attention to that day, September
5 26, 2003, do you recall where you were dirt
6 biking with Mr. Southworth that day?

7 A. I do.

8 Q. Where was that?

9 A. It was in Templeton, Massachusetts.

10 Q. Is there a particular location at Templeton
11 that you were dirt baking? Does it have a
12 name?

13 A. It doesn't have a name. It is just a sand pit,
14 if you want to call it that.

15 Q. A sand pit?

16 A. Yes.

17 Q. Do you know what time you arrived at the sand
18 pit that day?

19 A. Early afternoon, maybe 2:00, 3:00.

20 Q. How did you get there that day?

21 A. I went to Templeton with my brother.

22 Q. What is your brother's name?

23 A. Dylan Connelly.

24 Q. And when you arrived at the sand pit that day,

Page 6

Page

1 A. I work at a small convenience store in Bolton.

2 Q. What is the name of that store?

3 A. Country Cupboard.

4 Q. Calling your attention back to the year 2003,
5 did you know a person named Jeffrey Southworth?

6 A. Yes.

7 Q. Can you tell us approximately when it was that
8 you first met Mr. Southworth?

9 A. I believe it was some time in the summer of
10 2002.

11 Q. Do you know the setting, where you met him?

12 A. Not particularly.

13 Q. During the summer of 2003, did Mr. Southworth
14 and you engage in any dirt biking activities
15 together?

16 A. Yes.

17 Q. Can you tell me approximately how many times
18 during the summer of 2003 Mr. Southworth and
19 you were dirt biking together?

20 A. I would say about a dozen times.

21 Q. And on one of those occasions after dirt
22 biking, did Mr. Southworth and you go to the
23 Longhorn Steakhouse in Leominster,
24 Massachusetts?

1 was Jeffrey Southworth there?

2 A. No, he was not.

3 Q. At some point in time, did he arrive at the
4 sand pit? Did you see him there?

5 A. Yes.

6 Q. And by the way, if you just nod, we won't have
7 a record of your answers. So you need to say
8 your answer.

9 When you first saw him, was he in the
10 company of anyone else?

11 A. Yes.

12 Q. Who was that?

13 A. Scott Espy.

14 Q. Did you know Mr. Espy prior to September 26,
15 2003?

16 A. I did.

17 Q. Did you know him in a dirt biking setting?

18 A. I did.

19 Q. And others?

20 A. Yes.

21 Q. For how long did you remain dirt biking at the
22 sand pit in Templeton that day?

23 A. We were there until about dark, although I
24 stopped dirt biking a little bit before.

Page 9

Page 9

1 Q. Before what?

2 A. Before Jeff and Scott finished. My brother

3 actually took my dirt bike with him back to

4 school when he left.

5 Q. So you said you arrived with your brother, and

6 did you arrive in your brother's motor vehicle?

7 A. Yes.

8 Q. And did your brother leave Templeton, the sand

9 pit, at some point in time that day?

10 A. Yes.

11 Q. When did he leave, approximately?

12 A. Around 6:00.

13 Q. And did he take your dirt bike with him that

14 day when he left around 6:00?

15 A. Yes.

16 Q. So you stopped dirt biking at that point; is

17 that right?

18 A. Yes.

19 Q. At what time did Mr. Southworth stop dirt

20 biking?

21 A. It was right around when it got dark. I don't

22 specifically remember.

23 Q. And at some point in time, did you leave the

24 Templeton sand pit that day?

1 Q. Were there any pets in that motor vehicle?

2 A. There were. There were two dogs.

3 Q. Whose dogs were they?

4 A. They were Jeff's.

5 Q. And what was the layout of people and pets in

6 the motor vehicle on the trip from the sand pit

7 to the Longhorn Steakhouse?

8 A. I believe I was sitting in the back with the

9 two dogs, and Jeff and Scott were in the front.

10 Q. Who was driving?

11 A. Jeff was.

12 Q. And at approximately what time did you arrive

13 at the Longhorn Steakhouse?

14 Let me ask the question another way.

15 Approximately, how long did it take you to get

16 to the Longhorn Steakhouse from Templeton?

17 A. About half an hour.

18 Q. And when you arrived at the Longhorn

19 Steakhouse, where did you go? Where did you

20 first go?

21 A. We went in and we put our name in for a table,

22 and it was busy. So we went over to the bar to

23 wait for the table.

24 Q. That was the three of you -- Jeff, yourself and

Page 10

Page 10

1 A. We did.

2 Q. And did you leave in the company of anybody?

3 A. I left with Jeff and Scott.

4 Q. And approximately when was it that you left?

5 A. I know it was just getting dark or just shortly

6 after, maybe around 7:00.

7 Q. And prior to leaving the sand pit in Templeton,

8 did you see Jeffrey Southworth have any

9 alcoholic beverages?

10 A. No.

11 Q. Did all of you leave the sand pit together --

12 Jeffrey Southworth, Mr. Espy and yourself?

13 A. We did.

14 Q. And in whose motor vehicle did you leave the

15 sand pit?

16 A. It was Jeff's. I believe it was a rented

17 truck.

18 Q. And where did the three of you go?

19 A. We went to the Longhorn Steakhouse.

20 Q. And were there any other persons in the motor

21 vehicle, the rented truck, other than Jeff

22 Southworth, Mr. Espy and yourself, on the trip

23 from the sand pit to the Longhorn Steakhouse?

24 A. No, there were not.

1 Mr. Espy?

2 A. Correct.

3 Q. At the bar, did you see Mr. Southworth drinking

4 at all?

5 A. I did.

6 Q. What did you see him drinking?

7 A. I saw him drinking a beer.

8 Q. And do you know how many beers Mr. Southworth

9 had at the bar that day?

10 A. I remember him having one.

11 Q. Do you remember testifying at a deposition in

12 this case or in a related case back in August

13 of 2004?

14 A. I do.

15 Q. And do you remember being asked the question --

16 Let me show you the bottom here on page 28 at

17 Line 22.

18 "Do you know whether or not Jeff had more

19 than one beer while he was at the bar?"

20 Do you see that question?

21 A. Yes, I do.

22 Q. Do you remember that your answer was, "You

23 know, I think he did. I'm not -- I don't know

24 for a fact but, you know, he probably did."

Page 13

1 Do you see that?

2 A. I see that.

3 Q. So is it your best memory today that he

4 probably had more than one beer while he was

5 drinking at the bar?

6 MR. GILLIS: Objection.

7 A. I don't know. I don't remember. I remember

8 him ordering one beer.

9 Q. Do you have any explanation for why you

10 testified on August 19, 2004 that he probably

11 had more than one beer?

12 MR. GILLIS: Objection. That's not his

13 testimony.

14 He said on 28 he had a beer, and then you

15 asked him further when you were unhappy with

16 the answer, and he said "maybe."

17 His testimony isn't ever that he had more

18 than one beer.

19 MR. FARRAH: His testimony is his

20 testimony, and his testimony is in response to

21 the question, "Do you know whether or not Jeff

22 had more than one beer while he was at the

23 bar?"

24 His testimony is, "You know, I think he

Page 14

1 did. I'm not -- I don't know for a fact, but,

2 you know, he probably did."

3 MR. GILLIS: That's taken out of context.

4 You're not bringing the whole statement in on

5 28 when you asked him, "What did you see him

6 drinking?" He said "A beer."

7 If you're going to ask him a question,

8 give him the whole sequence. Don't take it out

9 of order.

10 MR. FARRAH: Motion to strike. You can

11 ask him what you want to ask him.

12 Q. My question to you is, do you have any

13 explanation for why you testified on August 19,

14 2004 that you think he had more than one beer

15 at the bar?

16 MR. GILLIS: Where did you say he said he

17 thinks he had more than one beer at the bar?

18 MR. FARRAH: I'm looking at 22 through 24.

19 MR. GILLIS: 22 to 23 is a question.

20 Maybe I'm missing something. On page 29, Lines

21 21 to 24 I don't see anywhere -- What line are

22 you saying that he said he had more than one

23 beer as opposed to you asking a question?

24 Q. On page 28, Line 22, the question is, "Do you

Page 1

1 know whether or not Jeff had more than one beer

2 while he was at the bar?"

3 The answer is, "You know, I think he did."

4 So my question --

5 MR. GILLIS: What page are you on?

6 MR. FARRAH: I'm on page 28.

7 MR. GILLIS: Line?

8 MR. FARRAH: 22.

9 MR. GILLIS: Again, I object. If you're

10 going to ask him a question, ask him to read

11 the whole page because you're just taking

12 things out of context.

13 Q. For the third time, can you explain why you

14 testified back in August of 2004 that you

15 thought Jeff had more than one beer while he

16 was at the bar?

17 A. I guess I said it because I think it could have

18 been possible.

19 Q. Can you explain why in August of 2004 you

20 testified that he probably -- on top of page

21 29 -- that he probably had more than one beer

22 while he was at the bar?

23 MR. GILLIS: Objection.

24 Q. You can answer.

Page 1

1 A. I don't.

2 Q. Fair enough. At some point in time, were you

3 seated at a table?

4 A. Yes, we were.

5 Q. And by the way, while you were at the bar, how

6 far away were you from Jeff?

7 A. I don't remember.

8 Q. Do you remember what part of the bar you were

9 seated at or standing at?

10 A. Not particularly. I kind of remember it being

11 somewhat busy and us not having seats.

12 Q. But you don't remember what section of the bar?

13 A. I don't.

14 Q. I'm going to show you what has been marked as

15 Exhibit 1 in your earlier deposition.

16 Do you recall looking at that floor plan

17 at some point in time?

18 A. Yes.

19 Q. Do you recall circling the area where the "3"

20 is located as the area where Jeff, you and

21 Mr. Espy were at the bar?

22 A. Yes.

23 Q. Does that refresh your memory about what part

24 of the bar the three of you were at on that

Page 17

Page 1

1 night?

2 A. It does.

3 Q. Is it accurate to say that you were at the area
4 circled with a "3" and an arrow pointing to it
5 on Exhibit 1 of your earlier deposition?

6 A. Yes.

7 MR. FARRAH: Can we mark that as Number 1
8 in this deposition?

9

10 (Exhibit Number 1 was marked for
11 identification.)
12

13 Q. Do you recall what the bartender or bartenders
14 who served you at the bar looked like that
15 night?

16 A. I don't.

17 Q. Do you remember testifying that it was a woman,
18 you thought, with blonde hair who had served
19 you that night?

20 A. I don't know whether she was at the bar or
21 serving a table. I remember a female that I
22 thought had blonde hair.

23 Q. Could you turn to page 31? Read the first
24 seven or eight lines of page 31 to yourself.

1 hair.

2 His testimony is, "I don't remember. I
3 just remember seeing blonde hair." Read the
4 whole answer.

5 MR. FARRAH: For the record, "Do you know
6 who served Jeff at the bar?"

7 "Answer: I mean, the bartender I remember
8 it was a girl?"

9 "Question: Woman? Women?"

10 "Answer: Yes. I don't specifically
11 remember. I think she had blonde hair. I just
12 remember seeing blonde hair."

13 Q. By the way, is it your best memory as you sit
14 here now that while he was at the bar, Jeffrey
15 Southworth had more than one beer?

16 MR. GILLIS: Objection, asked and
17 answered.

18 Q. You can answer.

19 MR. GILLIS: If you know.

20 Q. Read on page 30 the question that begins on
21 Line 15 to yourself and then your answer.

22 (Witness reviews document.)

23 Q. I want to ask you this question. Is it your
24 best memory as you sit here now that while he

Page 18

Page 2

1 (Witness reviews document.)

2 A. Okay.

3 Q. Does that refresh your recollection that it was
4 a blonde woman who waited on you at the bar?

5 A. I don't remember. I mean, I guess so.

6 Q. Okay. For the record, you were asked the
7 question --

8 MR. GILLIS: For the record, we want an
9 accurate transcript. So we'd prefer your best
10 memory, but if you're guessing, please don't do
11 that.

12 Neither Mr. Farrah nor I want you to guess
13 at answers you don't know.

14 A. I honestly don't remember.

15 Q. Do you recall testifying that you thought the
16 woman who served you at the bar had blonde
17 hair; is that right?

18 MR. GILLIS: Objection. I think his
19 testimony was that he didn't specifically
20 remember.

21 Q. "I think she has blonde hair," is what it says
22 there. "I just remember seeing blonde hair."

23 MR. GILLIS: Read the whole answer. His
24 testimony isn't that he saw a woman with blonde

1 was at the bar, Jeff Southworth had more than
2 one beer?

3 MR. GILLIS: Objection.

4 A. No.

5 Q. Do you recall that you were asked that question
6 at your deposition?

7 A. Yes.

8 Q. And that your answer at that time was, "I'd say
9 so, yes"?

10 A. Yes.

11 Q. Do you have any explanation for why your answer
12 today is different from your testimony back in
13 August of 2004?

14 A. To be honest with you, after looking at the
15 receipt for the bill, I'm pretty sure that
16 there could be no way that he had more than one
17 beer at the bar.

18 Q. Did you see the receipt for the bar?

19 A. I believe the bill for the bar was with the
20 bill for the table.

21 Q. What makes you say that?

22 A. That's as I remember that.

23 Q. When did you see the receipt for the bill?

24 A. Maybe a month ago.

Page 21

Page 2

1 Q. Where did you see it?

2 A. When I met with John DiNatale.

3 Q. A private investigator?

4 A. Yes.

5 Q. What did Mr. DiNatale say to you?

6 A. He just wanted to go over what I had said in

7 some of the depositions and show me the receipt

8 for the bar, and just tell me when I come in

9 here to tell the truth and if I don't know the

10 answer, don't speculate; just only say what I

11 know.

12 Q. Okay, and you didn't speculate when you

13 testified at your deposition, did you?

14 MR. GILLIS: Objection. The prior one

15 you're referring to?

16 MR. FARRAH: Either deposition.

17 A. I suppose I may have.

18 Q. You speculated at your deposition?

19 A. Well, I don't think I was making things up, but

20 when I say I don't exactly remember, this could

21 have been the case.

22 I remember one thing, but certainly

23 another thing could have happened.

24 Q. When you testified on August 19, 2004, you were

1 Q. You gave some testimony?

2 A. Yes.

3 Q. He showed you that?

4 A. Yes.

5 Q. Was that accurate?

6 A. Yes.

7 Q. Was your deposition accurate in August of 2004?

8 MR. GILLIS: Which part? You asked the

9 same question at the deposition five times, and

10 you kept asking it because you didn't like the

11 answer.

12 So if you're going to ask him if it's

13 accurate, which time? The time when he said he

14 had only one beer or the time you asked him

15 three pages later?

16 Q. Was your deposition accurate?

17 MR. GILLIS: Which part?

18 MR. FARRAH: Any part.

19 A. I believe so, yes.

20 MR. FARRAH: Now, I just want to stop for

21 a second. I'll be right back. I want the

22 receipt of what Mr. DiNatale showed you.

23 (Off the record.)

24 Q. Back on the record. Back to Mr. DiNatale, did

Page 22

Page 2

1 sworn to tell the truth before you testified;

2 isn't that right?

3 A. Yes.

4 Q. Okay, and you did the best you could to tell

5 the truth at that time; isn't that right?

6 A. Yes.

7 Q. Since that time, Mr. DiNatale has seen you; is

8 that right?

9 A. Yes.

10 Q. Did he tell you who he was working for?

11 A. I can't remember. I know he is working for one

12 of the sides -- one of the law firms.

13 Q. How long did you spend with Mr. DiNatale?

14 A. Maybe twenty minutes.

15 Q. And he showed you some records?

16 A. Yes.

17 Q. What did he show you?

18 A. He showed me the printout when I was at the

19 grand jury.

20 Q. The printout of the bill at the grand jury for

21 the Longhorn?

22 A. He showed me a printout of the receipt, and

23 also when I went into the grand jury in Lowell

24 before the grand jury.

1 he tell you who he was working for?

2 A. He did. I know he's working for one of the law

3 firms. I don't know.

4 Q. Did he tell you he was working for Mr. Gillis's

5 firm? That is the gentleman sitting next to

6 you.

7 A. I suppose he did. I honestly don't remember

8 which firm he said he was working for.

9 Q. Before you testified in August of 2004, had any

10 investigators, other than police investigators,

11 spoken to you about your upcoming testimony?

12 A. No.

13 Q. So when you went into that testimony, you

14 didn't have the benefit of anybody's assistance

15 in preparing for the deposition; is that right?

16 MR. GILLIS: Objection.

17 A. Yes.

18 Q. But Mr. DiNatale knew that you were coming to

19 be deposed in this case; isn't that right?

20 MR. GILLIS: Objection.

21 A. Yes.

22 Q. He told you to tell the truth at the

23 deposition; isn't that right?

24 MR. GILLIS: Objection.

Page 25

Page 2

1 A. Yes.
 2 Q. And he showed you some documents; is that
 3 right?
 4 A. Yes.
 5 Q. One of the documents he showed you was a
 6 printout of the bar check; is that right?
 7 A. That's right.
 8 Q. I want you to look at this document which is
 9 Exhibit 11 in the Kristin O'Donnell deposition.
 10 It's a few page document. I'd like you to look
 11 at it, if you could. Take a moment.
 12 (Witness reviews document.)
 13 Q. It's Table 52; is that right? Take as long as
 14 you need to look at it to familiarize yourself
 15 with the document.
 16 (Witness reviews document.)
 17 Q. Is that the document that Mr. DiNatale showed
 18 you when you met with him?
 19 A. I think so, yes.
 20 MR. FARRAH: That, for the record, is
 21 Exhibit 11 to Ms. O'Donnell's deposition.
 22 Why don't we mark it as Exhibit 2 to this
 23 deposition?
 24

1 Q. Based in part on that discussion, you now do
 2 not believe that Jeff Southworth had more than
 3 one beer at the bar; is that right?
 4 MR. GILLIS: Objection.
 5 A. Correct.
 6 Q. That's because there's something in Exhibit 2
 7 that suggests to you that it was an
 8 impossibility that he had more than one beer at
 9 the bar?
 10 MR. GILLIS: Objection.
 11 Q. Is that right?
 12 A. Yes.
 13 Q. What is it about that that Mr. DiNatale pointed
 14 out to you in Exhibit 2?
 15 MR. GILLIS: Objection. You're putting in
 16 evidence that's not there. You're saying what
 17 did he point to, and there's no evidence here
 18 that he pointed to anything.
 19 You can't lead the witness. It's your
 20 deposition.
 21 Q. Did Mr. DiNatale point to something in
 22 Exhibit 2 that led you to conclude that it was
 23 impossible for Jeff to have had more than one
 24 beer at the bar?

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Page 2

1 (Exhibit Number 2 was marked for
 2 identification.)
 3
 4 Q. Was it just Mr. DiNatale and you who met, and
 5 nobody else?
 6 A. Correct.
 7 Q. Where did you meet with him?
 8 A. He came to my house.
 9 Q. He had called you beforehand to arrange that
 10 meeting?
 11 A. Yes.
 12 Q. Your best memory of when the meeting happened
 13 is when?
 14 A. I believe it was around a month ago.
 15 Q. He gave you his card?
 16 A. Yes.
 17 Q. Do you still have it?
 18 A. Not on me, but I do have it.
 19 Q. Do you remember his first name?
 20 A. I think it's John.
 21 Q. And you and he discussed what now has been
 22 marked as Exhibit 2 in your deposition; is that
 23 right?
 24 A. Yes.

1 A. He asked me what I remembered him having at the
 2 bar, and I told him that I remembered him
 3 having a beer.
 4 It was a possibility that he could have
 5 had more, and I told him I remembered Scott
 6 having a beer as well, and at that point he
 7 said, "There were only two beers ordered. So
 8 where did the third beer come from," and I
 9 said, "I guess it didn't come."
 10 Q. Did Mr. DiNatale show you where there were only
 11 two beers ordered as reflected in what has now
 12 been marked as Exhibit 2 in your deposition?
 13 A. Yes.
 14 Q. Could you show me what he pointed to?
 15 A. There's one at the top of what says page 8, and
 16 the second one is towards the end of page 9
 17 right here.
 18 Q. The one at the top of page 8 -- You said
 19 page 8?
 20 A. Yes.
 21 Q. Is that the very top line on page 8?
 22 A. It is.
 23 Q. It says "\$3.99, twenty-five-ounce Bud Light"?
 24 A. Correct.

Page 29

1 Q. And to review that, you need to go to the
2 previous page; is that right?
3 A. Yes.
4 Q. That's part of an order that was placed at
5 8:40 p.m.; is that right?
6 A. Yes.
7 Q. So that's one of the references that
8 Mr. DiNatale pointed out to you about the
9 beers; is that right?
10 A. Yes.
11 Q. And the other reference that Mr. DiNatale
12 pointed out to you, I think you said was on
13 page 9; is that right?
14 A. Towards the end.
15 Q. Again, we're looking at Exhibit 2 to your
16 deposition; is that right?
17 A. Yes.
18 Q. Do you see it?
19 A. Yes.
20 Q. It looks like at 9:15 p.m. there was an order
21 for a \$3.99 twenty-five-ounce Bud Light?
22 A. Yes.
23 Q. So based on Mr. DiNatale showing you the
24 earlier reference at 8:40 p.m. and the second

Page 30

1 reference at 9:15 p.m., you now understand that
2 it was not possible for Jeff to have had more
3 than one beer at the bar; is that right?
4 MR. GILLIS: Objection.
5 A. I believe so.
6 Q. Did Mr. DiNatale tell you that what's been
7 marked as Exhibit 2 to your deposition included
8 the bill for the beers that were served at the
9 bar to Jeff and Mr. Espy?
10 A. He didn't say whether they were or weren't.
11 Q. Well, if you can tell me what it is about
12 Exhibit 2 that Mr. DiNatale pointed out to you
13 that suggested to you that the two beers we've
14 been talking about, 8:40 and 9:15, were the
15 beers that were served to them at the bar?
16 MR. GILLIS: Objection.
17 A. The fact that I just remember the bar tab being
18 carried over to the table. I mean, it's
19 obvious that they're different times, I guess.
20 I don't know.
21 Q. I want to know.
22 MR. GILLIS: If you don't know, say you
23 don't know, but don't guess.
24 MR. FARRAH: This is not your witness.

Page 3

1 MR. GILLIS: You're asking him to guess
2 because you don't want the accurate testimony.
3 I'm just telling him to tell the truth.
4 If you have a problem with that, then fine.
5 MR. FARRAH: I have no problem with that.
6 I'm trying to find out what Mr. DiNatale said
7 at a later date.
8 Q. What did Mr. DiNatale tell you about the beer
9 at 8:40 and the beer at 9:15? What did he tell
10 you?
11 A. He told me those were the two beers of the
12 bill.
13 Q. Did he say what they meant and what they
14 reflected?
15 A. He just said those are reflected, the two beers
16 that they were drinking.
17 Q. At the bar?
18 MR. GILLIS: Objection.
19 A. I don't know.
20 Q. Did he say that the two beers that are
21 reflected on Exhibit 2 to your deposition were
22 two beers that were served at the bar?
23 MR. GILLIS: Objection.
24 A. I don't remember.

Page 3

1 Q. Is it accurate to say that you're basing your
2 testimony that Jeff probably did not have more
3 than one beer at the bar on Exhibit 2 that
4 Mr. DiNatale showed you?
5 MR. GILLIS: Objection.
6 A. Solely or entire? Can you repeat it one more
7 time?
8 Q. Yes.
9 A. I remember him having a beer at the bar, but
10 that was at the bar. I remember him having one
11 beer, you know, throughout the night.
12 I remember him having a beer, but whether
13 he ordered another beer, which I don't remember
14 or not, at the table, that would not be at the
15 bar.
16 Q. Do you remember testifying that at the table
17 Jeff had probably four beers?
18 MR. GILLIS: Objection.
19 A. I believe I did. I mean, I think I read that
20 somewhere.
21 Q. Your memory of the events back in August of '04
22 was better than your memory of the events
23 today; isn't that right?
24 MR. GILLIS: Objection.

Page 33

Page 3

1 A.I guess you can say that.
 2 Q.And back in August of '04 on Page 38, Line 4 of
 3 your deposition began a series of questions
 4 that you were asked about Jeff drinking at the
 5 table.
 6 Do you recall being asked the question,
 7 "While you were at the table, did you see Jeff
 8 drinking any alcoholic beverages?"
 9 Do you recall that?
 10 A.Yes.
 11 Q.And your answer was, "Yes."
 12 Did you see him drinking any beers?
 13 A.Yes.
 14 Q.How many beers, to your best memory, did you
 15 see him drink at the table?
 16 A.Do you want me to read off of this?
 17 Q.Tell me, first of all, what you testified to
 18 back in August.
 19 A.I answered "Maybe four, maybe."
 20 Q.My question to you today is, did you see him
 21 drinking beers at the table?
 22 A.I know that he had a beer at the table.
 23 Q.Do you know if he had more than one beer at the
 24 table?

1 working for the lawyers who are representing
 2 the Longhorn Steakhouse?
 3 MR. GILLIS: Objection.
 4 A.At that time, yes.
 5 Q.He told you that; isn't that right?
 6 A.Yes.
 7 Q.And while he was at the table, did you also see
 8 Jeff drinking Manhattans?
 9 A.Yes.
 10 Q.How many Manhattans did you see him drink at
 11 the table?
 12 A.I remember him having at least a Manhattan. As
 13 of right now, I don't know what I testified to.
 14 Q.Let's read it. Do you see the question
 15 beginning on page 38, Line 16? Let me read the
 16 question.
 17 It says, "What is your best memory of the
 18 number of Manhattans that you saw him drinking
 19 at the table?"
 20 What was your answer?
 21 A."Probably two. I know that he ordered like a
 22 round of them. I don't, you know, I don't
 23 really remember how many. I think, you know,
 24 I'd probably say two."

Page 34

Page 3

1 A.I don't know.
 2 Q.Do you have any explanation for why back in
 3 August of 2004 you testified that your best
 4 memory was he had maybe four beers at the
 5 table?
 6 A.I mean anything is possible. I know that he
 7 had a beer, but I guess it's possible that he
 8 could have had more beers.
 9 Q.You testified that he had maybe four beers;
 10 isn't that right?
 11 A.Correct. That would be why, the possibility of
 12 why I said that.
 13 Q.Now, prior to your August 2004 testimony,
 14 nobody had spoken to you about your upcoming
 15 testimony; isn't that right?
 16 A.Right.
 17 Q.Prior to today's testimony, Mr. DiNatale had
 18 spoken to you; isn't that right?
 19 A.Yes.
 20 Q.Did you discuss the question of how many beers
 21 to the best of your memory did you see him
 22 drink at the table, with Mr. DiNatale?
 23 A.No.
 24 Q.Did you understand that Mr. DiNatale was

1 Q.Do you remember giving a statement to the
 2 police after the investigation or after the
 3 accident?
 4 A.Yes.
 5 Q.And you had not spoken to Mr. DiNatale before
 6 you gave that statement; isn't that right?
 7 A.Correct.
 8 Q.And nobody had talked to you, other than the
 9 police, about what Jeff had to drink at the
 10 restaurant; is that right?
 11 A.Correct.
 12 Q.Now, let me ask you this. Is there any
 13 question in your mind about that when Jeff and
 14 Mr. Espy and you first arrived at the
 15 restaurant, you went to the bar?
 16 A.Okay.
 17 Q.Is there any question in your mind about that?
 18 A.I know we went to the bar.
 19 Q.You didn't have anything to drink that night --
 20 alcoholic beverages -- did you?
 21 A.No.
 22 Q.And is there any question in your mind about
 23 that both Jeff and Mr. Espy when they went to
 24 the bar, they ordered a beer upon arrival at

Page 37

Page 3

1 the bar?

2 A. No.

3 Q. That happened; is that right?

4 A. Correct.

5 Q. And they made that order at the same time; is

6 that right?

7 A. As best as I can remember. I can't

8 specifically recall them both saying, you know,

9 the time when they said, "Can I have a beer?"

10 Q. But the three of you were in the bar area for

11 some period of time before the others in your

12 group arrived; isn't that right?

13 A. Yes.

14 Q. Fifteen or twenty minutes?

15 A. Yes.

16 Q. And during that fifteen or twenty minutes, it

17 was just the three of you at the bar; isn't

18 that right?

19 A. Correct.

20 Q. And they were drinking beer at the bar; isn't

21 that right?

22 A. Correct.

23 Q. So when you were talking to Mr. DiNatale about

24 your testimony at your August 2004 deposition

1 Q. Mr. DiNatale didn't tell you that the bar tab

2 was on Exhibit 2, did he?

3 A. No.

4 Q. But he pointed to the two beers on Exhibit 2,

5 didn't he?

6 A. Yes.

7 Q. What did he say about them?

8 A. He said those were the two beers that were

9 ordered.

10 Q. Ordered at the bar?

11 MR. GILLIS: Objection.

12 A. He didn't say or he may have said. I don't

13 remember. I remember him saying those are the

14 two beers that they were drinking.

15 Q. Mr. DiNatale was not at the Longhorn Steakhouse

16 the night of September 26 to the best of your

17 memory; isn't that right?

18 A. Correct.

19 Q. Did you see Jeff drinking beer while he was at

20 the table?

21 A. Yes.

22 Q. And how many beers did you see Jeff drinking

23 while he was at the table?

24 A. I remember him having a mug in front of him.

Page 38

Page 4

1 and he showed you this Exhibit 2 to your

2 deposition, did you have any discussion with

3 him about the times that the beers were shown

4 to have been ordered on Exhibit 2?

5 A. No, other than him pointing out just the two

6 beers were ordered. We didn't discuss anything

7 further.

8 Q. But you understood that the bar tab was on

9 Exhibit 2; isn't that right?

10 MR. GILLIS: Objection.

11 A. Yes.

12 Q. Mr. DiNatale told you that; isn't that right?

13 MR. GILLIS: Objection.

14 A. I don't know. I don't believe so.

15 Q. What then was the basis for your understanding

16 that the bar tab is on Exhibit 2?

17 A. Me recalling that the bar -- whatever the bill

18 at the bar was -- they just asked for it to be

19 brought to the table.

20 I don't specifically remember them paying

21 the tab at the bar.

22 Q. That's the sole basis for your statement that

23 the bar tab is on Exhibit 2?

24 A. Yes.

1 Q. The same size at the table that he had had at

2 the bar?

3 A. Yes.

4 Q. The same beer perhaps at the table that he had

5 had at the bar?

6 A. Yes.

7 Q. And the same kind of beer?

8 A. Yes.

9 Q. And how many drinks of Jack Daniels did Jeff

10 have at the table?

11 A. I remember seeing him have at least one. After

12 seeing this, it's clear that it looks like he

13 had two --

14 MR. GILLIS: Objection.

15 A. -- if the rounds were ordered.

16 Q. Did Mr. DiNatale and you discuss how many Jack

17 Daniels Manhattans are reflected on Exhibit 2?

18 A. Yes.

19 Q. How many are reflected on Exhibit 2?

20 A. I can't remember. I need to count them.

21 Q. Do you remember other people drinking Jack

22 Daniels Manhattans as well?

23 A. Yes.

24 Q. And so my question to you is, what is your best

Page 41

1 memory of the number of Manhattans that you saw
 2 Jeff drinking at the table?
 3 MR. GILLIS: Objection, already asked and
 4 answered.
 5 A. Two.
 6 Q. What is your best memory of the number of beers
 7 you saw Jeff drinking at the table?
 8 MR. GILLIS: Objection.
 9 A. One.
 10 Q. And can we agree that your best memory of the
 11 number of beers you remember him drinking at
 12 the table in 2004 was four?
 13 MR. GILLIS: Objection. That's not what
 14 the answer says.
 15 Q. Maybe four?
 16 MR. GILLIS: Objection.
 17 A. I testified to that.
 18 Q. Before you saw Mr. DiNatale?
 19 MR. GILLIS: Objection.
 20 Q. Is that right?
 21 A. Yes.
 22 Q. Now, before you saw Mr. DiNatale, you also
 23 signed a statement for the police; isn't that
 24 right?

Page 42

1 A. Yes.
 2 Q. Take a look at this and see if that is the
 3 statement that you signed for the police.
 4 A. It looks like it.
 5 Q. And how many drinks with Jack Daniels did you
 6 tell the police Jeff had with dinner?
 7 A. It says here maybe three drinks with Jack
 8 Daniels.
 9 Q. Was that true?
 10 A. Yes.
 11 Q. Okay, and you also said, "We had dinner. Jeff
 12 had a couple of beers (maybe two)," in your
 13 statement to the police; isn't that right?
 14 A. Yes.
 15 Q. Was that true?
 16 A. Yes.
 17 MR. FARRAH: Can we have this marked as
 18 the next exhibit?
 19
 20 (Exhibit Number 3 was marked for
 21 identification.)
 22
 23 (Off the record.)
 24 Q. I want to talk about Mr. DiNatale again. What

Page 4

1 I'd like you to do for me in your own words is
 2 tell me as best as you can recall everything
 3 Mr. DiNatale said to you and everything you
 4 said to Mr. DiNatale during your
 5 twenty-minutes-or-so meeting with him.
 6 A. Well, when he first came, he introduced himself
 7 and I introduced myself to him, and he asked me
 8 if I was in school, and I told him that I was
 9 currently going to Fitchburg State.
 10 I think it was during my winter break. So
 11 I was not in class, and he made a little chat
 12 and asked me what sports or what I liked to do.
 13 I said I liked to snowboard and ski, and
 14 he mentioned that his -- I'm not sure who it
 15 was -- some relative of his is going to be in
 16 the Olympics, to watch out for him.
 17 Then he told me that he wanted to talk to
 18 me and just sort of tell me what I'm coming in
 19 here to do, and he showed me Exhibit 2, and he
 20 asked me what I remembered Jeff having to drink
 21 that night, and, you know, if I remembered the
 22 bar tab being brought over to the table, and I
 23 told him I did, and he went through Exhibit 2
 24 and he counted the beers and he counted the

Page 4

1 Jack Daniels drinks, and he asked me if I
 2 remembered them being ordered, and I said I
 3 remembered them being ordered in rounds.
 4 So then he just told me when I came in
 5 here to don't make something up if you don't
 6 know it.
 7 He just wanted me to know that I'm coming
 8 in here to tell what I know and if I don't
 9 know, then I'm not going to tell it.
 10 Q. Did he suggest to you that you had made
 11 something up before?
 12 MR. GILLIS: Objection.
 13 A. No.
 14 Q. Because you had not made something up before,
 15 had you?
 16 A. I had not made something up. I mean, I just
 17 believed that it could have been possible.
 18 Q. By the way, did he say what sport his relative
 19 was going to participate in, in the Olympics?
 20 A. I believe it's snowboarding.
 21 Q. Did he say the name of the relative?
 22 A. He did. I don't remember it.
 23 Q. Okay. After that discussion, you testified a
 24 little while ago that he told you what you were

Page 45

1 coming in here to do; do you recall that?

2 A. Yes.

3 Q. What did he tell you you were coming in here to

4 do?

5 A. He was telling me that I was being deposed to

6 come in here to tell what I knew about the

7 night regarding Jeff Southworth and the

8 Longhorn Steakhouse.

9 Q. Did he tell you what he was coming to see you

10 to do?

11 A. He told me that he was coming to see me to, you

12 know, kind of tell me where I stand in all of

13 this.

14 Q. And did he tell you why he was coming to tell

15 you to do that?

16 A. Because he was hired.

17 MR. GILLIS: If you know. Don't guess.

18 MR. FARRAH: This is not your witness.

19 MR. GILLIS: If he's guessing, I don't

20 want a guess. You can tell from his mannerisms

21 that he is.

22 MR. FARRAH: Whatever you think you can

23 tell, you can tell, but let the witness

24 testify. I don't think this is your witness

Page 46

1 yet.

2 MR. GILLIS: Do you have a problem with me

3 telling him to tell the truth and not to guess

4 if he doesn't know?

5 MR. FARRAH: I have a problem with you

6 interrupting him. When it's your turn, you can

7 ask him whatever you want.

8 MR. GILLIS: Why do you have a problem

9 with him telling the truth?

10 MR. FARRAH: I have no problem with him

11 telling the truth.

12 MR. GILLIS: Why do you have a problem

13 with him not guessing?

14 MR. FARRAH: I have a problem with you

15 saying don't guess.

16 MR. GILLIS: What's wrong with that?

17 MR. FARRAH: Because he's in the middle of

18 answering. That's the problem I have.

19 MR. GILLIS: If you think he's guessing,

20 you should ask him that.

21 MR. FARRAH: You're the one who thinks

22 he's guessing. This is not your witness. As

23 far as I know, you don't represent him.

24 MR. GILLIS: I don't represent him.

Page 4

1 Q. Now, back to the question. Did Mr. DiNatale

2 tell you why he was coming to see you?

3 A. He told me that he was working as a private

4 investigator for the case, and he was hired

5 to -- Well, I don't know exactly what he was

6 hired to do, but he was, you know, going to

7 come and talk to me and just, you know, kind of

8 show me, like, for example, Exhibit 2 and

9 discuss it, and, you know, just once again kind

10 of tell me the most important thing is to come

11 in here and tell what I know and to not say

12 something that I don't know for sure.

13 Q. "Don't guess"? Is that what he said to you?

14 A. I don't know the words that he said, but yes.

15 Q. But you were not guessing before, were you?

16 A. I don't think so.

17 Q. Okay. When you testified before the grand

18 jury, were you guessing?

19 A. No.

20 Q. When you gave the statement marked as Exhibit 3

21 in your deposition today to the police, were

22 you guessing?

23 A. No.

24 Q. When you testified on August of 2004, were you

Page 4

1 guessing?

2 A. No.

3 Q. Okay. One of the other things that

4 Mr. DiNatale told you was where you stood in

5 all of this. At least that is what you

6 testified to a moment ago. What did he say

7 about that?

8 A. He just told me that I was the witness that was

9 with Jeff that night and I had not had anything

10 to drink, and that, you know, whatever I would

11 remember would probably be the most accurate

12 with respect to the people and members of the

13 group who had had drinks.

14 Q. Did he tell you anything else about where you

15 stood other than that?

16 A. I don't remember.

17 Q. Okay. Did he say you were the only one who was

18 sober at the table or words that effect?

19 MR. GILLIS: Objection.

20 A. He said I was the only one who was not

21 drinking.

22 Q. You knew that.

23 A. Yes.

24 Q. You didn't need Mr. DiNatale to tell you that,

Page 49

1 did you?

2 A. No.

3 Q. Did Mr. DiNatale tell you anything else about

4 where you stood in all of this?

5 A. I don't remember him saying anything else.

6 Q. When he showed you Exhibit 2, what did he say

7 about it? Exhibit 2 is the tab.

8 A. Well, he first asked me what I remembered being

9 ordered and who was drinking and who was at the

10 table, and I told him that I thought that the

11 tab was brought over from the bar, and he asked

12 me what I remembered being ordered at the bar,

13 and he counted up the number of Jack Daniels

14 drinks that were ordered and the number of

15 beers in Exhibit 2.

16 Q. And did he say anything about Exhibit 2, other

17 than counting up the number of Jack Daniels?

18 Did he say anything about it to you?

19 A. He told me that what was ordered here, what was

20 drinking here, and well, I don't remember him

21 specifically saying if the tab from the bar was

22 brought over, then that was all that was

23 ordered throughout the night, but that was what

24 I had taken from this.

Page 50

1 Q. Did you say to him that you believed that what

2 was ordered at the bar was reflected in

3 Exhibit 2?

4 A. I think so.

5 Q. Well, let's see if we can do better than that.

6 Do you have a memory?

7 A. I don't.

8 Q. When you were meeting with him, it was your

9 belief that what was ordered at the bar was

10 reflected in Exhibit 2?

11 A. Yes.

12 Q. Did you share that belief with him?

13 A. I'm pretty sure I did.

14 Q. When you shared that belief with him, what did

15 he say about that?

16 A. Well, he asked me who were the ones I

17 remembered having the beers, and I told him

18 that I remembered Jeff having one and Scott

19 having one, and then he told me that, "Well, if

20 those are the two beers, then Jeff had a beer."

21 Q. Referring to Exhibit 2?

22 A. Correct.

23 Q. And did he tell you whether Jeff's beer at the

24 bar was the one that is reflected at 8:40 or

Page 5

1 the one that is reflected at 9:15?

2 A. No.

3 Q. He didn't tell you which one was the one that

4 Jeff ordered at the bar?

5 A. He didn't.

6 Q. But you understood that what Jeff ordered at

7 the bar was either the one that is reflected at

8 8:40 or the one that is reflected at 9:15; is

9 that right?

10 A. Yes.

11 Q. Did you tell him that, that you understood,

12 looking at Exhibit 2, that what Jeff had

13 ordered at the bar was reflected as either the

14 8:40 beer or the 9:15 beer?

15 A. I never told him that. What I told him was

16 that I thought that the tab from the bar was

17 brought over and represented in this exhibit.

18 Q. Did he disagree with that?

19 A. No.

20 Q. Did he agree with that?

21 A. I think so. I honestly don't remember him

22 saying "I agree."

23 MR. GILLIS: Objection.

24 Q. But you don't remember him saying, "I disagree

Page 5

1 with that," do you?

2 A. No.

3 Q. What were you drinking that night?

4 A. To be honest with you, I don't remember. I

5 remember being asked the question before, and I

6 don't remember what I said.

7 Q. Coke? Were you drinking Coke?

8 A. I know I was having soda.

9 Q. And typically, what kind of soda do you order?

10 A. Mostly either Coke or maybe a Sprite.

11 Q. Did Mr. DiNatale and you talk at all about what

12 you were drinking that night?

13 A. No.

14 Q. Did Mr. DiNatale and you discuss at all whether

15 what you were drinking that night is reflected

16 on Exhibit 2 to your deposition?

17 A. I don't remember talking about that.

18 Q. Have you looked at Exhibit 2 to your deposition

19 to see whether or not what you were drinking

20 that night is reflected on it?

21 A. No.

22 Q. What were you eating that night?

23 A. I think I had some ribs. I'm not 100 percent

24 sure.

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Page 5

1 Q. Now, at the bar did Jeff order any Jack Daniels
 2 Manhattans?
 3 A. No.
 4 Q. Are you sure?
 5 A. Yes, at the time.
 6 Q. At the time that Jeff was delivered his last
 7 drink, was he exhibiting any signs of
 8 intoxication to you?
 9 A. No.
 10 Q. Was he loud?
 11 A. He didn't stand out to be. I mean, I don't
 12 know exactly what you mean by "loud."
 13 Q. Was the table loud?
 14 A. Yes. Do you mean with respect to everything
 15 else?
 16 Q. Was the table loud?
 17 A. Not extremely.
 18 Q. Okay. Did Mr. DiNatale talk to you at all
 19 about whether or not Jeff was exhibiting any
 20 signs of intoxication that evening?
 21 A. I believe he did.
 22 Q. Can you tell us what you remember about that?
 23 A. I'm pretty sure he asked me if I remembered him
 24 acting like he was drunk.

1 Longhorn, did Jeff appear to you to be under
 2 the influence of what he had been drinking at
 3 the Longhorn," and your answer was, "I mean,
 4 yeah, a little bit." Do you see that?
 5 A. I do.
 6 Q. Did he appear to be under the influence of what
 7 he was drinking at the Longhorn?
 8 MR. GILLIS: Objection.
 9 A. I don't remember him -- I don't know how to say
 10 this, you know, exhibiting clear signs of
 11 intoxication.
 12 I mean, I guess obviously anyone who is
 13 drinking anything will be under the influence
 14 of what they're drinking, but I don't remember
 15 him clearly showing signs of intoxication.
 16 Q. Okay. So is it your testimony today that he
 17 appeared to be under the influence of what he
 18 was drinking at the Longhorn because anybody
 19 who is drinking is under the influence of what
 20 he is drinking?
 21 A. Yes.
 22 Q. And he did appear to you to be under the
 23 influence of what he was drinking; is that
 24 right?

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Page 5

1 Q. "Drunk"? Is that what he said?
 2 A. I don't know what he said.
 3 Q. What do you remember he said?
 4 MR. GILLIS: Objection.
 5 A. I remember him asking, I guess, if he was
 6 exhibiting signs of alcohol.
 7 MR. GILLIS: Objection, and I'm going to
 8 say it again, we cannot have answers here that
 9 are guesses. He said "I guess it was."
 10 We have to have your memory, not a guess.
 11 A. I honestly don't know what questions he asked
 12 me.
 13 Q. What did you say?
 14 A. I told him that I didn't see any signs of being
 15 drunk or intoxicated.
 16 Q. While you were at the Longhorn, did Jeff appear
 17 to you to be under the influence of what he had
 18 been drinking at the Longhorn?
 19 MR. GILLIS: Objection.
 20 A. No.
 21 Q. Can you turn to page 49 of your earlier
 22 deposition? Will you go down to Line 12, and
 23 do you recall being asked in August of 2004 the
 24 question, "Okay, while you were at the

1 MR. GILLIS: Objection.
 2 A. Yes.
 3 Q. Did Jeff appear to hold himself that night at
 4 the Longhorn in the same way he usually did?
 5 A. Without reading this, I honestly don't
 6 remember.
 7 Q. Let me withdraw that question. I guess you've
 8 answered it.
 9 At some point in time, did somebody come
 10 over from the restaurant and ask the table to
 11 quiet down?
 12 A. Yes.
 13 Q. And that was how long before you left?
 14 A. I honestly don't remember.
 15 Q. Could you look at pages 43 and 44, please?
 16 Actually, you have to start at 42.
 17 A. All right.
 18 Q. I started to ask you a question at the bottom
 19 of 42.
 20 "Did anybody while you were at the table
 21 that night say," and then you interrupted. You
 22 said "I," and then I said, "I'm sorry?"
 23 Then you said, "I kind of remember now. I
 24 don't know who it was, whether it was, you

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Page 5

1 know, a manager or someone. It might have even
2 been our waitress. I remember someone coming
3 over and asking our table to be quiet, a little
4 bit quieter."

5 Do you remember that happening?

6 A. Yes.

7 Q. Do you remember that testimony?

8 A. Yes.

9 Q. And then I'm going to ask you now on the
10 record, was that because the table was loud?

11 A. Yes.

12 Q. And who was making a lot of noise that night at
13 the table?

14 MR. GILLIS: Are you asking the question?

15 Q. I'm asking the question. Who was making a lot
16 of noise that night at the table?

17 A. We all were.

18 Q. Jeff included?

19 A. Yes.

20 Q. And then I asked you on page 44, Line 14, "Give
21 me your best estimate of how much time elapsed
22 from when the woman came over and told you to
23 tone it down and when you left the restaurant,"
24 and your answer was, "Maybe twenty-five minutes

1 A. Yes, I do.

2 Q. What was your answer?

3 A. "Yeah, I mean, yes."

4 Q. Do you have any explanation as to why you
5 testified differently today than how you
6 testified in your deposition in August?

7 A. Well, everyone was loud at the table. So
8 that's why I said that.

9 Q. That's your explanation as to why you testified
10 differently today than how you testified in
11 August?

12 A. Well, I guess if -- I won't guess. If he was
13 being loud at the table, then it would be
14 louder with respect to everyone else in the
15 restaurant, you know, and I mean, he's not a
16 loud kid, but he was not a quiet kid.

17 So yes, he was being a little bit louder
18 than he usually is, you know, as a one on one
19 or, you know, just to talk with him.

20 Q. So which is it today, Mr. Connelly? Was he
21 louder that night than he usually is or wasn't
22 he?

23 A. He was.

24 Q. Do you have any explanation for why a moment

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Page 6

1 to half an hour."

2 Does that refresh your memory as to how
3 long after you were told to quiet down it was
4 that the group left the restaurant?

5 A. Yes.

6 Q. Now, by the way, am I correct that the person
7 that served your group at the table was not the
8 person that served you at the bar?

9 A. Yes.

10 Q. Both blonde?

11 A. Yes.

12 Q. Can you turn back to page 49 for me?

13 A. All right.

14 Q. Now, my question to you is, was Jeff sloppier
15 looking that night than he usually is? I'm
16 asking you the question now on the record.

17 A. Yes.

18 Q. Was he louder that night than he usually
19 appeared to you?

20 A. No.

21 Q. Do you recall being asked on page 50, the
22 question was, "Was he louder than he usually
23 appeared to you?"

24 Do you see that?

1 ago you said he wasn't?

2 A. Well --

3 MR. GILLIS: Objection.

4 A. You know, when you talk to him, he would be
5 pronounced. So he was somewhat of a -- As I
6 said, he was not quiet.

7 So that would be why I said it, but
8 everyone was loud with respect to everyone else
9 in the restaurant. So he was a little bit
10 louder.

11 Q. Was that because, in your opinion, of what he
12 had to drink?

13 MR. GILLIS: Objection.

14 A. No.

15 Q. Was Mr. Southworth exhibiting signs of
16 intoxication at the time that the waitress came
17 over to the table and asked you to quiet down?

18 A. No.

19 Q. Do you remember making an affidavit?

20 A. I do.

21 Q. Do you remember talking to Mr. DiNatale about
22 your affidavit?

23 A. What is the affidavit?

24 Q. Do you remember talking with Mr. DiNatale about

Page 61

Page 6

1 your affidavit?

2 A. Which is the affidavit? I remember doing an

3 affidavit, but I don't remember it. I know we

4 had a couple of things with him.

5 Q. Is that your signature?

6 A. It is. I've done this a few times, and I just

7 don't know which one is which.

8 Q. Take a look at this document.

9 (Witness reviews document.)

10 (Short recess.)

11 MR. FARRAH: Could we have his affidavit

12 marked as the next exhibit, please?

13

14 (Exhibit Number 4 was marked for

15 identification.)

16

17 Q. Mr. Connelly, I'm going to show you what has

18 been marked as Exhibit 4 in this deposition.

19 Do you see it?

20 A. Yes.

21 Q. It's your affidavit; is that right?

22 A. Correct.

23 Q. That's your signature?

24 A. It is.

1 "I also testified on pages 42 to 44 of my

2 deposition that approximately one half hour

3 before we left the Longhorn Steakhouse,

4 everyone at the table was loud, including

5 Mr. Southworth, and either a waitress or a

6 manager at the restaurant came and asked us to

7 be quiet."

8 Do you see that?

9 A. I do.

10 Q. Did I read that correctly?

11 A. Yes.

12 Q. Was that true that approximately one half hour

13 before you left, everyone at the table was

14 loud, including Mr. Southworth, and either a

15 waitress or a manager came to you and asked you

16 to be quiet?

17 A. Yes.

18 Q. Paragraph 7 reads, "At that time when the table

19 was asked to quiet down, Mr. Southworth was

20 exhibiting all the signs of intoxication I

21 testified about on pages 49 through 51 of my

22 deposition."

23 Do you see that?

24 A. Yes.

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1 Q. On page 2?

2 A. Yes.

3 Q. Would you turn to Paragraph 5? Paragraph 5

4 reads, "In my deposition of pages 49 to 51, I

5 testified that during the course of the evening

6 at the Longhorn Steakhouse, Mr. Southworth

7 seemed to be under the influence of the

8 alcoholic beverages he was being served at the

9 restaurant."

10 Do you see that?

11 A. Yes.

12 Q. Did I read that correctly?

13 A. You did.

14 Q. And you understood you made this affidavit

15 under the pains and penalties of perjury in May

16 of 2005?

17 A. Yes.

18 Q. My question is, during the course of the

19 evening at the Longhorn Steakhouse, did

20 Mr. Southworth seem to be under the influence

21 of the alcoholic beverages he was being served?

22 MR. GILLIS: Objection.

23 A. Yes.

24 Q. And then Paragraph 6 of your affidavit reads,

1 Q. Did I read that right?

2 A. You did.

3 Q. And is that true that at the time when the

4 table was asked to quiet down, Mr. Southworth

5 was exhibiting all the signs of intoxication

6 that you testified to on pages 49 through 51 of

7 your deposition?

8 MR. GILLIS: Objection.

9 A. Yes.

10 Q. Let's look at pages 49 to 51 of your

11 deposition.

12 My question I asked some time ago was,

13 "Was Jeff holding himself at the time the table

14 was asked to quiet down the same way he usually

15 held himself?"

16 A. I honestly don't remember. So I'm going to use

17 this because this is what is going to be

18 correct.

19 Q. Do you recall testifying in August of 2004 in

20 response to the question, "What did he show?

21 What did he manifest that makes you say that,"

22 and that was that he appeared to be a little

23 bit under the influence of what he was

24 drinking?

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1 Do you remember answering in part, "That
2 night he was, you know, sort of just seemed to
3 me that he was a little bit under the influence
4 just because by the way he didn't really hold
5 himself. At least it looked like he didn't
6 hold himself the same way as he usually did."
7 Do you recall that testimony?
8 A. Yes.
9 Q. Is that accurate that that night he didn't hold
10 himself the same way he usually did?
11 MR. GILLIS: Objection.
12 A. Yes. Let me just say what I just answered is
13 yes, but also, I mean, I think that this had
14 something to do with it, but what I said is
15 what I said and it is yes, but, you know, we
16 were dirt biking, and it's not, you know, when
17 I usually see him, we're dirt biking, and I
18 have never really spent that much time with him
19 not dirt biking.
20 So, you know, what I remember him holding
21 himself is from dirt biking.
22 Q. You've seen him in fights; isn't that right?
23 MR. GILLIS: Objection.
24 A. I have.

1 MR. GILLIS: Objection.
2 A. No.
3 Q. Let's go back to what I was asking you before.
4 That night at the Longhorn, was Jeff sloppier
5 looking than he usually is?
6 A. Yes.
7 Q. Was he louder than he usually appeared to you?
8 A. Yes.
9 Q. Were his eyes glassy?
10 A. Can I use this answer because I honestly don't
11 remember?
12 MR. GILLIS: That's your answer. He can't
13 use that as his answer. It has to be his
14 memory.
15 Q. Do you have a memory?
16 A. I don't.
17 Q. Do you have a memory of whether or not Jeff's
18 eyes were glassy at all that night?
19 A. I don't.
20 Q. Can you read to yourself page 50, Line 23
21 through page 51, Line 4?
22 (Witness reviews document.)
23 Q. Have you done that?
24 A. Yes.

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Page 6

1 Q. You've seen him at parties; isn't that right?
2 A. I remember seeing him at a party.
3 Q. You've seen him in at least one fist fight;
4 isn't that right?
5 A. I do. At that point, I was not really familiar
6 with him, but yes, that's correct.
7 Q. You testified about seeing him in a fist fight.
8 You remember that, don't you?
9 A. If I did, I did. I don't remember, but I guess
10 I did.
11 Q. Did you talk to the private investigator,
12 DiNatale, about your testimony at the
13 deposition?
14 A. This?
15 Q. Did you talk to Mr. DiNatale when he came to
16 your house about the testimony that you've
17 given at your earlier deposition?
18 A. I think he asked -- I don't think we -- No, we
19 didn't discuss, you know, what was asked and
20 what was answered in the deposition.
21 Q. Did Mr. DiNatale, for example, say to you
22 something like, "You testified at your
23 deposition that Jeff had four beers maybe at
24 the table"?

1 Q. Does that refresh your memory about whether or
2 not Jeff's eyes were glassy that night at the
3 restaurant at the time you were asked to quiet
4 down?
5 A. A little bit.
6 Q. What is your memory now of whether or not
7 Jeff's eyes were glassy at the time your table
8 was asked to quiet down?
9 MR. GILLIS: Objection.
10 A. They could have been.
11 Q. They very well could have been?
12 MR. GILLIS: Objection.
13 A. They could have been, but I don't specifically
14 remember. I don't remember looking at him and,
15 you know, looking into his eyes and wondering
16 if they were glassy. As I say, they could have
17 been.
18 Q. They very well could have been?
19 MR. GILLIS: Objection, asked and
20 answered.
21 A. Yes.
22 Q. Do you have any explanation as to why you
23 testified in August of 2004 that his eyes very
24 well could have been glassy?

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1 MR. GILLIS: Objection. Are you talking
2 about the top of 51? What line are you looking
3 at?

4 MR. FARRAH: You figure it out.

5 MR. GILLIS: What line are you referring
6 to?

7 MR. FARRAH: I'm asking him a question.

8 MR. GILLIS: No, you're not. You're
9 asking him to read something in the book. Are
10 you asking him to read it?

11 MR. FARRAH: I'm asking him if he has an
12 explanation for why he testified that his eyes
13 very well could have been glassy.

14 MR. GILLIS: If you put the book in front
15 of him, I want a page reference so we can put
16 it on the record.

17 MR. FARRAH: He's already testified.

18 A. It's possible that his eyes could have been
19 glassy. That's why.

20 Q. Do you have a memory of it?

21 A. Of seeing his eyes glassy?

22 Q. Yes.

23 A. No.

24 Q. Do you have any explanation for why you

Page 7

1 that right?

2 A. Yes.

3 Q. At that time, you said two; is that right?

4 A. Yes.

5 Q. And when you gave the statement to the police
6 on November 2, 2003 which has been marked as
7 Exhibit 3 in your deposition, you had not seen
8 what has been now marked as Exhibit 2, the tab?

9 A. No.

10 Q. And at that time, you wrote that he had had
11 maybe three drinks with Jack Daniels with
12 dinner; is that right?

13 A. Yes.

14 Q. What was the basis for making that statement
15 back in November of 2003?

16 A. Well, the first one would be the round that I
17 specifically remember being ordered.

18 The second one would be when more were
19 ordered and the possibility that he drank
20 another one.

21 Q. Your memory of the events of September 26 was
22 better in November of 2003 than it is today?

23 A. Yes.

24 Q. A lot better?

Page 70

1 testified, "They very well could have been
2 glassy"?

3 MR. GILLIS: Objection.

4 A. Other than it's possible, I don't.

5 Q. What is your best memory as you sit here today
6 as to how many Jack Daniels Manhattans that
7 Jeff had at the table?

8 MR. GILLIS: Objection.

9 A. Two.

10 Q. And the basis for that is what?

11 A. I specifically remember a round being ordered,
12 and then I see that some more were ordered, and
13 I don't know whether they were ordered in a
14 round or, you know, a few here and a few there,
15 but it looks like apparently he had another
16 one.

17 Q. That testimony is based on the fact that you
18 have now seen Exhibit 2 to your deposition; is
19 that right?

20 MR. GILLIS: Objection.

21 A. Yes.

22 Q. Before you saw Exhibit 2 to your deposition,
23 you had testified about how many Jack Daniels
24 Manhattans he had had in August of 2004; isn't

Page 7

1 A. I'd say so.

2 MR. GILLIS: Objection.

3 Q. Do you remember anybody else drinking beers at
4 the table, besides Jeff?

5 A. I remember Scott having beer.

6 Q. At the table?

7 A. Yes.

8 Q. Ordered from the waitress?

9 A. I don't remember if it was ordered from the
10 waitress or ordered from the bartender.

11 Q. Do you have a memory of Jeff carrying a beer
12 from the bar over to the table?

13 A. Yes.

14 Q. And do you have a memory of Scott carrying a
15 beer over from the bar to the table?

16 A. Well, I remember seeing Jeff bringing his beer
17 over, and I remember them saying something
18 about having the tab brought over to the table.

19 I don't remember seeing Scott carry the
20 beer over to the table as I did Jeff.

21 Q. Then do you remember Jeff ordering beers while
22 he was at the table?

23 A. I don't.

24 Q. Do you remember Jeff ordering chowder while he

Page 73

1 was at the table?

2 A. I don't.

3 Q. How about fingers, whatever they are? Do you

4 remember ordering those at the table?

5 A. I don't remember any of the specific things or

6 who or when they were ordered specifically,

7 besides the round of Manhattans.

8 Q. You remember one round of Manhattans being

9 ordered?

10 A. Yes.

11 Q. You've looked at the check, and do you see that

12 more than one round of Manhattans is reflected

13 on that check; is that right?

14 A. Yes.

15 Q. Did you discuss that at all with Mr. DiNatale?

16 A. Yes.

17 Q. What did he say and what did you say about

18 that?

19 A. Well, he asked me what I remember being ordered

20 in reference to the Manhattans, and I told him

21 I remembered the first round of drinks being

22 ordered and that I remembered more being

23 ordered, but I don't know whether they were in

24 a round or individuals ordered them or, you

Page 74

1 know, this side of the table said we'll take

2 another round or how it exactly came about.

3 Q. What did he say?

4 A. Well, he pointed out that the first one looked

5 like it was a round ordered, and he said that

6 there were more ordered and that it looked

7 like, you know, if going with the round that

8 was first ordered that each person would have

9 had another one.

10 Q. So did he say anything else about the Jack

11 Daniels that were ordered?

12 A. I remember him asking me how many people I

13 specifically remembered being there with

14 reference to how many drinks were ordered.

15 Q. What did you tell him?

16 A. I told him that I remembered besides myself, I

17 remembered Scott Espy, Jeff Southworth, Michael

18 Espy, Todd Perry, and then two other people

19 whom I didn't know.

20 I believe I referred to them as one was a

21 snowmobiler and one I remember them calling him

22 Fat Matt.

23 Q. Who called him Fat Matt?

24 A. Everyone. I didn't call him -- They referred

Page 7

1 to him as Fat Matt. They didn't call him Fat

2 Matt.

3 Q. So he asked you how many people were there at

4 the table.

5 So does that mean including yourself,

6 there were seven people at the table?

7 A. That I remember.

8 Q. You don't remember any other people, do you?

9 A. No.

10 Q. You had two tables pulled together for your

11 party; is that right?

12 A. Yes, I believe it was at least two tables.

13 Q. And you were sitting across from Jeff; is that

14 right?

15 A. Yes.

16 Q. And you had nothing obstructing your view of

17 Jeff; is that right?

18 A. Correct.

19 Q. What I want to know is, where is the first

20 round of Manhattans that is on Exhibit 2?

21 Which is the first round of Manhattans that

22 you're referring to?

23 A. It has to be this one.

24 Q. Okay, and you're pointing to the 8:51 round; is

Page 7

1 that right?

2 A. Yes. I see there are some ordered before that.

3 I mean, I must be wrong in saying the first

4 time it was ordered it was not a full round.

5 That's what I remembered.

6 Q. I want to know what you remember talking to

7 Mr. DiNatale about as it relates to the

8 Manhattans, the rounds of Manhattans that were

9 ordered.

10 A. I remember telling him that a round was

11 ordered, and then there were more ordered, and

12 they went around to the different people that

13 were at the table, and he, once again, asked me

14 who I remembered at the table, and then he, you

15 know, kind of did like some calculation and

16 added up all the Jack Daniels that were

17 ordered, which I cannot remember how many there

18 were, and he asked me what -- No, I don't

19 remember what he asked me.

20 He just made reference to, you know, there

21 were seven people that I remembered being

22 there, and then there were this many Jack

23 Daniels ordered.

24 Q. After he had calculated the number of people at

Page 77

Page 7

1 the table and the number of Jack Daniels that
 2 were ordered, did he do anything with those
 3 calculations?
 4 A. Well, he asked me if I remembered them being
 5 rounds and I said yes.
 6 Q. What did you say?
 7 A. He asked me how I remembered them being ordered
 8 and I told him, you know, rounds, and then he
 9 told me, "All right. So there's this many
 10 people at the table and a round is ordered and
 11 then another round is ordered," and then I
 12 believe there were I'm not sure how many.
 13 I don't remember the number, but I don't
 14 believe that accounted for all of them.
 15 Q. So did he interpret that for you at all?
 16 MR. GILLIS: Objection.
 17 A. No, not that I remember.
 18 Q. I'm going to represent to you that there were
 19 seventeen Jack Daniels drinks ordered.
 20 Does that sound like the number that
 21 Mr. DiNatale shared with you?
 22 A. Yes.
 23 Q. There were six people, according to your
 24 testimony, who were of drinking age --

1 exactly what he said.
 2 He said that there were -- I believe he
 3 asked me who had them, and I told him that I
 4 didn't remember.
 5 Q. But you know you didn't have any; is that
 6 right?
 7 A. Yes.
 8 Q. Okay, and Scott, Jeff and you were seated
 9 before the others arrived; is that right?
 10 A. No.
 11 Q. Just before the others arrived?
 12 A. We were seated -- Well, I honestly don't
 13 remember at this point. I remember them coming
 14 in the door.
 15 I don't remember whether we sat down right
 16 before them or if we all sat down right
 17 together.
 18 Q. And do you remember the first order of Jack
 19 Daniels, that is, how many were ordered?
 20 A. I remember a round being ordered.
 21 Q. Who ordered it?
 22 A. I think Jeff did.
 23 Q. You'd seen Jeff drink Jack Daniels Manhattans
 24 before?

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1 A. Okay.
 2 Q. -- at table that night. Does that sound like
 3 what you and Mr. DiNatale talked about?
 4 A. Yes.
 5 Q. Did he talk at all about the relationship
 6 between seventeen Jack Daniels Manhattans and
 7 six people of drinking age at the table?
 8 A. Well, I believe that he told me that if what I
 9 remember was being ordered as rounds, then
 10 there were unaccounted-for drinks.
 11 Q. Unaccounted-for drinks?
 12 A. Yes.
 13 Q. What did he mean by that?
 14 MR. GILLIS: Objection.
 15 A. Drinks that I said I remembered a round being
 16 ordered and then more rounds and I guess
 17 another round was ordered, and I didn't
 18 specifically say another round being ordered,
 19 but there were more drinks ordered to the
 20 table.
 21 Q. He pointed that out to you?
 22 A. Yes.
 23 Q. What did he say about that?
 24 A. I don't remember. I mean, I don't remember

1 MR. GILLIS: Objection.
 2 A. No.
 3 Q. How are the Jack Daniels Manhattans served --
 4 on the rocks or straight up?
 5 A. I don't know.
 6 Q. Do you know the difference?
 7 A. Yes; one has ice and one doesn't.
 8 Q. So it's your best memory that Jeff ordered the
 9 first round of Jack Daniels Manhattans?
 10 A. Yes.
 11 Q. At the time he ordered those Jack Daniels
 12 Manhattans, did he also order a beer?
 13 MR. GILLIS: Objection.
 14 A. I can't say for sure.
 15 Q. Can you describe the waitress?
 16 A. I remember her being a woman, and I remember
 17 her having blonde hair.
 18 Q. Tall? Short?
 19 A. I don't know.
 20 Q. Older or younger than the barmaid?
 21 A. Well, I don't really remember the bartender
 22 that well. So I don't really know how to base
 23 an answer on that.
 24 I remember her being like maybe in her

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1 mid-twenties.
 2 Q. Who are we talking about?
 3 A. The waitress.
 4 Q. Do you remember the age of the barmaid?
 5 A. No.
 6 Q. Do you have any memory of the age of the
 7 barmaid?
 8 MR. GILLIS: Objection.
 9 A. No.
 10 Q. Is your memory exhausted as to the age of the
 11 barmaid?
 12 A. Yes.
 13 Q. Can you turn to page 35, please, the bottom.
 14 Just read 18 to 24 to yourself.
 15 (Witness reviews document.)
 16 A. Okay.
 17 Q. Does reading that refresh your memory as to how
 18 old the barmaid was?
 19 A. Not specifically.
 20 Q. Do you have any reason to doubt that your
 21 testimony back in August about her age was
 22 accurate?
 23 MR. GILLIS: Objection.
 24 Q. August of 2004.

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1 MR. GILLIS: Objection.
 2 A. I'm sure whatever I said here is what I
 3 remembered. I don't remember it now.
 4 Q. When you say "here," you mean in your
 5 deposition of August of 2004?
 6 A. Correct.
 7 Q. And do you remember anyone at the table after
 8 Jeff ordered the first round of Jack Daniels
 9 Manhattans, do you remember anyone at the table
 10 saying anything about the delay in receiving
 11 the drinks?
 12 A. No.
 13 Q. And how long after you had sat at the table was
 14 it that the first round was ordered by Jeff?
 15 A. I don't know.
 16 Q. And do you have a memory as you sit here today
 17 that a second round of Jack Daniels Manhattans
 18 was ordered?
 19 A. Yes.
 20 Q. By Jeff?
 21 A. I can't say that for sure.
 22 Q. Who do you remember ordered the second round?
 23 MR. GILLIS: Objection.
 24 A. I don't recall who specifically ordered it.

Page 8

1 Q. What was the basis for your memory that a
 2 second round of Jack Daniels was ordered?
 3 A. Well, I remember more Jack Daniels at the
 4 table, and this exhibit shows that there were
 5 more.
 6 Q. Exhibit 2?
 7 A. Yes.
 8 Q. Do you have a memory that a third round of Jack
 9 Daniels Manhattans was ordered?
 10 A. No.
 11 Q. Do you have a memory that there was a third
 12 instance where Jack Daniels Manhattans were
 13 ordered?
 14 MR. GILLIS: Objection.
 15 A. I do not remember. It is apparent that there
 16 was. I just don't specifically remember.
 17 Q. Do you remember talking to Mr. DiNatale about
 18 that?
 19 A. A third?
 20 Q. Yes, a third round of Jack Daniels Manhattans
 21 being ordered.
 22 A. I don't remember him saying anything about a
 23 third round. I remember him talking about --
 24 as I referred to before -- the unaccounted-for

Page 8

1 drinks.
 2 Q. When the check came to the table, did it come
 3 to Jeff?
 4 A. I don't know. It was put on the table.
 5 Q. Jeff paid for you that night; is that right?
 6 A. Correct.
 7 Q. When the person came over and told the table to
 8 quiet down, what is your best memory of who
 9 that person was, what that person looked like?
 10 MR. GILLIS: Objection.
 11 A. I don't really remember. I just remember
 12 someone came over and asked the table to, you
 13 know, be a little bit quieter.
 14 Q. A man? A woman?
 15 A. I don't remember specifically. I'm not
 16 supposed to guess.
 17 Q. Is that because Mr. Gillis tells you not to
 18 guess?
 19 A. No. I don't think that I should guess.
 20 Q. Mr. DiNatale told you not to guess, right?
 21 A. He did tell me not to guess, but if I don't
 22 know the truth, not to come up with one.
 23 Q. What do you remember whoever the person was
 24 that came over to the table saying about

Page 85

1 quieting down?

2 MR. GILLIS: Objection.

3 A. I just remember them asking us to tone it down

4 a little bit.

5 Q. Do you remember to whom at the table that

6 person spoke or with whom at the table that

7 person spoke?

8 A. As far as I remember, it was speaking to the

9 whole table.

10 Q. You could hear that person?

11 A. Yes.

12 Q. How far away were you from the other end the

13 table, the furthest end away from you?

14 A. Well, the way I remember it --

15 Q. Let's look at Exhibit 1, if that helps you.

16 A. Could I use the pen for a minute?

17 Q. If you're going to write on something, why

18 don't you --

19 A. I can explain it, but it would be a lot easier.

20 Q. Here's a blank one for you.

21 A. This section right here is where we sat. There

22 weren't four tables there.

23 What I remember is, if you just imagine,

24 this is the table that everyone sat at, whether

Page 86

1 it be one, two or three or how many tables.

2 I remember Scott sitting on the end and

3 Jeff sitting here and I was sitting here. I

4 don't specifically remember what the order of

5 the other people was.

6 So I believe that there would be two more

7 people, and then at the end of the table

8 someone else would be right there on the other

9 end. So I would be two seats away.

10 Q. Do you remember anyone seated to your right?

11 A. Besides Scott, no.

12 Q. Well, am I wrong that this is you right here?

13 A. No. That's Jeff. I'm facing this way.

14 Q. Do you remember anyone seated to your left?

15 A. Yes.

16 Q. Who?

17 A. I don't know who.

18 Q. You were not drinking any alcoholic beverages

19 that night, were you?

20 A. No.

21 Q. Do you have any explanation for who drank the

22 seven Jack Daniels Manhattans that were

23 ordered, according to Exhibit 2, at 8:51 p.m.?

24 A. Well, that was the round. I honestly don't

Page 8

1 know exactly how it happened, but I remember,

2 you know, whoever ordered the first round,

3 which I believe was Jeff, ordered a round, and

4 the waitress came over and put them down, and

5 you know, then they were drinking.

6 I guess if she ordered seven, then she

7 counted the number of people that were at the

8 table and brought over seven. That would be my

9 accounting for those.

10 Q. You remember Jeff saying words to the effect

11 "Bring us a round of Jack Daniels Manhattans"?

12 A. Yes.

13 Q. And do you remember Jeff at that time ordering

14 for you something to drink?

15 A. I think I already had a drink at that point.

16 Q. From the bar?

17 A. Yes, I guess. Well, I can't say that, sorry.

18 Q. So my question is, do you remember Jeff

19 ordering a drink for you?

20 MR. GILLIS: Objection.

21 Q. By "a drink," I don't mean an alcoholic

22 beverage. I mean something to drink.

23 A. No. I'm pretty sure she asked me what I wanted

24 and I ordered it.

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1 Q. The waitress?

2 A. Yes.

3 Q. Now, when the first round came, was there some

4 discussion about that there was an extra drink

5 there?

6 A. I don't remember any discussion. I suppose

7 since there was an extra drink that -- I don't

8 remember anything.

9 Q. Do you know who drank the extra drink?

10 MR. GILLIS: Objection.

11 A. No.

12 Q. Did Mr. DiNatale tell you that Table 52

13 reflected the table that you were at that

14 night?

15 A. Yes.

16 Q. He told you that; is that right?

17 A. Yes. He also said this, which I don't think I

18 mentioned before.

19 He asked me when he was speaking to me

20 about the unaccounted-for drinks. He asked me

21 if I remembered an eighth person, which I told

22 him I didn't remember an eighth person. Those

23 were the people that I remembered.

24 Q. Did he tell you that there was an eighth person

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1 at the table?

2 A. He didn't tell me that there was an eighth

3 person at the table.

4 Q. Did he suggest that there was an eighth person

5 at the table?

6 MR. GILLIS: Objection.

7 A. Well, what he did is he did the same thing as

8 he did with the seven people at the table with

9 eight people at the table, leaving less

10 unaccounted-for drinks.

11 Q. Try to tell me what you remember him saying

12 about doing the same thing with eight people at

13 the table as he had done with seven people at

14 the table.

15 A. If there were seventeen drinks and there were

16 six other people and me, if there were seven

17 people that would be one round would be six,

18 second round would be twelve, leaving five

19 unaccounted-for drinks.

20 Q. That's what he called them?

21 A. I don't know what he called them. That's what

22 I'm calling them.

23 Q. What did he call them?

24 A. I don't remember.

1 A. Yes.

2 Q. Did you discuss that with him?

3 A. Other than him counting it up and asking me how

4 many beers I thought were drinking throughout

5 the evening, no.

6 Q. Did Mr. DiNatale discuss with you at all how a

7 check is generated at the Longhorn Steakhouse?

8 A. Yes. He said that they have to enter it -- the

9 waitress, that is. Each waitress, dealing with

10 each table, has to log it into a computer.

11 Q. So he explained that to you; is that right?

12 A. Yes.

13 Q. What else did he tell you about how the check

14 is generated?

15 A. That's all I remember him telling me. He said

16 the last one out reflects everything, but I

17 don't remember anything else.

18 Q. And do you have a memory that Jeff ordered at

19 the bar chowder?

20 A. No.

21 Q. Fingers?

22 A. No.

23 Q. Any food at the bar at all?

24 A. No.

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Page 9

1 Q. What did he say about the five what you've

2 called unaccounted-for drinks?

3 A. I don't know. I just remember him asking me if

4 there was a possibility that there was another

5 person, and then him doing the same

6 calculation.

7 So there would be seven other people than

8 me, so the first round seven, second round

9 fourteen, leaving three unaccounted-for drinks,

10 as what I'm calling them.

11 Q. But he went through that calculation with you?

12 A. I don't know if he went through that

13 calculation. He said there would be less other

14 drinks -- less drinks that I'm calling

15 unaccounted-for.

16 Q. Did you discuss with Mr. DiNatale the 8:40

17 order?

18 A. I believe so.

19 Q. What did he say about the 8:40 order?

20 A. He may have said something else, but what I

21 remember is he was just counting them up,

22 including all the other ones.

23 Q. The 8:40 order reflects a beer as well as

24 Manhattans; isn't that right?

1 Q. At any time that night while you were at the

2 restaurant, did anyone get up and leave the

3 table?

4 A. Yes; specifically, Jeff.

5 Q. When did he get up and leave the table?

6 A. It was some point after we had been served our

7 dinner.

8 Q. And where did he go?

9 A. He went to the bathroom.

10 Q. And how do you know that?

11 A. Well, our location where our table was was

12 relatively close to the bathroom, and I saw him

13 walk over and use the bathroom.

14 Q. And did you see him come back to the table?

15 A. Yes.

16 Q. Did anybody else get up at any point in time

17 and leave the table that you recall?

18 A. Not specifically. I'm sure if someone had to

19 go and get up and use the restroom they did,

20 but I remember Jeff doing that and not anyone

21 else.

22 Q. What did you have to eat that night?

23 A. I'm pretty sure that I had ribs.

24 Q. Anything else?

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1 A. No.
 2 Q. Did you all order food at the same time,
 3 everybody at your able?
 4 A. I'm pretty sure.
 5 Q. Did you have any discussions with Mr. DiNatale
 6 about how many meals were ordered by this
 7 table?
 8 A. No.
 9 Q. Have you looked at Exhibit 2 to see how many
 10 meals were ordered by this table?
 11 A. No.
 12 Q. Did everybody eat? As far as you know, did
 13 everybody order a meal?
 14 A. I believe so.
 15 Q. Now, do you remember Jeff, while you were
 16 sitting at the table, ordering a beer?
 17 A. I don't specifically remember him ordering a
 18 beer at the table.
 19 Q. But you remember him drinking a beer at the
 20 table; is that right?
 21 A. Yes.
 22 Q. Do you remember him drinking more than one beer
 23 at the table?
 24 MR. GILLIS: Objection.

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1 A. I cannot say that for sure.
 2 Q. You have no memory today; is that right?
 3 A. Right.
 4 Q. You had a memory in the past but not today?
 5 MR. GILLIS: Objection.
 6 A. Yes.
 7 Q. Now, did Mr. DiNatale and you discuss, when you
 8 were reviewing Exhibit 2, that it seems to
 9 reflect that at 9:21 p.m. four Jack Daniels
 10 Manhattans were ordered?
 11 A. Okay.
 12 Q. Did you discuss that?
 13 A. I believe so.
 14 Q. Is that right, did you?
 15 A. Yes.
 16 Q. What did he say and what did you say about
 17 that?
 18 A. Well, when I mean discuss it, we didn't discuss
 19 this order in particular. We discussed all of
 20 them together.
 21 Q. My question to you is, can we agree, I guess
 22 initially, that Exhibit 2 shows that at 9:21
 23 four Jack Daniels were ordered by the table?
 24 A. Yes.

1 Q. Did you discuss that with him?
 2 A. Yes.
 3 Q. Here's four that were ordered?
 4 MR. GILLIS: Are you asking did he discuss
 5 that specific round?
 6 MR. FARRAH: That's right, that specific
 7 round, 9:21.
 8 A. He made reference to that login saying four
 9 rounds were ordered, but we never discussed
 10 each of these.
 11 Then this next one there was 9:24, that
 12 one and then the next or whatever happened
 13 about that. We didn't discuss each of them.
 14 We discussed all of them.
 15 He went through and he said this one at
 16 this time these were ordered, and at this time
 17 these were ordered and at this time these were
 18 ordered.
 19 Q. He's telling you this; is that right?
 20 MR. GILLIS: Objection.
 21 A. Yes.
 22 Q. What is he saying about it, besides telling you
 23 this?
 24 A. He was just using those as evidence for how

1 many Manhattans were ordered to the table,
 2 trying to come up with, you know, how many
 3 drinks were drinking by each person.
 4 Q. Did he ever say words to the effect, "If you
 5 divide seventeen by six you get almost three"?
 6 MR. GILLIS: Objection.
 7 A. No.
 8 Q. What did he say about trying to figure out how
 9 many drinks were drunk by each person?
 10 A. I think he was trying to account for which
 11 drinks were drinking by which people and how
 12 many drinks each person had, but I don't
 13 remember who had what drink and how many each
 14 person had.
 15 Q. Do you remember anyone at the table appearing
 16 drunk to you that night?
 17 MR. GILLIS: Objection.
 18 A. No.
 19 Q. How about the Espy who was not there with you
 20 that night? Did he appear under the influence
 21 to you?
 22 A. Not particularly.
 23 Q. Have you ever spoken with him since this
 24 incident?

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1 A. You mean since that night?

2 Q. Since that night.

3 A. Yes.

4 MR. GILLIS: The Espy?

5 Q. The Espy that was not dirt biking with you.

6 A. Yes.

7 Q. Did you learn from speaking with him that he

8 had been drinking beers in the hotel room with

9 his two other friends that afternoon?

10 MR. GILLIS: Objection.

11 Q. After September 26 did you learn?

12 A. After the restaurant when we left the

13 restaurant?

14 Q. No. In your conversations with Mike Espy after

15 September 26, 2003, did he ever tell you that

16 he had been drinking beers that afternoon,

17 September 26, 2003, before going to the

18 restaurant with two of his friends?

19 A. Before the restaurant?

20 Q. Yes.

21 A. No.

22 Q. He didn't tell you that?

23 A. No.

24 Q. Did he tell you what he had been doing that

Page 98

1 afternoon before he came to the restaurant?

2 A. I mean, when you said I've spoken with him,

3 I've spoken to him because my brother is

4 friends with him.

5 He's a little bit closer in age to some of

6 these kids, and he every once in a while will

7 hang out with them.

8 I actually play on an indoor soccer team

9 with Scott, and his brother will come every

10 once in a while and I'll speak to him, but we

11 never discussed that night.

12 Q. Who have you discussed that night with?

13 A. Other than you and people that I have been

14 deposed to talk to or the grand jury or

15 Mr. DiNatale or the state police or anyone else

16 that had me come in and talk to them.

17 Q. You have not spoken to Mr. Gillis prior to

18 today, have you?

19 A. No.

20 Q. How about anyone from his office? Have you

21 spoken to anyone from his office prior to

22 today?

23 A. No.

24 Q. Are you sure?

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1 A. Well, I don't know. I mean --

2 Q. Have you spoken to anybody, other than

3 Mr. DiNatale?

4 A. I know what you're talking about. I spoke

5 to -- I just didn't think he was in the same

6 office.

7 I spoke to Mr. Parkinson. I thought he

8 was in a different office.

9 MR. GILLIS: Let's put on the record

10 there's no one named Parkinson in my office.

11 Q. When did you speak to Mr. Parkinson?

12 A. It was sometime during last semester.

13 Q. Last semester being the semester that ended

14 when?

15 A. About December 21.

16 Q. Of 2005?

17 A. Yes.

18 Q. And your best memory of when it is that you

19 spoke to Mr. DiNatale is when?

20 A. It was over break.

21 Q. Is that after December 21, 2005?

22 A. Yes.

23 Q. When is your best memory?

24 A. Let me think for a minute. I went on vacation.

Page 10

1 I had to reschedule this because I was going on

2 vacation just after New Year's, and I remember

3 speaking to him like on the phone.

4 He was saying that I want to meet with

5 you, and then I went on vacation and it was

6 probably two weeks after that, I want to say.

7 Q. When did you come back from vacation?

8 A. I came back, I think like -- Does anyone have a

9 calendar?

10 Q. Give me your best estimate.

11 A. It was probably the eighth of January.

12 Q. And approximately two weeks after that you

13 spoke to Mr. DiNatale; is that right?

14 MR. GILLIS: Objection.

15 A. Yes. So I guess I said it was a month ago, but

16 I guess it was not a month ago.

17 Q. Mr. Parkinson is someone you spoke to before

18 the end of the semester; is that right?

19 A. Correct.

20 Q. The semester ended December 21. What is your

21 best memory of when you spoke to Mr. Parkinson?

22 A. I can't say for sure. I know I met with him

23 two different times, and the first time he

24 asked me some questions about that night, and

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1 he came up with an affidavit, something similar
2 to this, and then he sent it to me, and he
3 wanted me to return it, but then he called me
4 and said, "I'll just meet you again to get it
5 from you," so he could see me sign so I don't
6 have to go to the notary.

7 So then I met with him again, and then he
8 had to make like a new one or he had to change
9 something.

10 I remember what it was. He said we were
11 dirt biking in Leominster, and I wanted him to
12 change it to Templeton, and I had to go to the
13 notary and send it to him.

14 Q. And who did you understand Mr. Parkinson was
15 working for?

16 A. He said that he was representing Rare
17 Hospitality.

18 Q. What is your best memory of when you met with
19 Mr. Parkinson?

20 A. Maybe mid November, early November.

21 Q. And where did you meet with him?

22 A. In Leominster at the restaurant Panera Bread.

23 Q. P-a-n-e-r-a?

24 A. Yes.

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1 Q. And who else was there?

2 A. It was just me and Mr. Parkinson.

3 Q. How old is Mr. Parkinson?

4 A. I don't know.

5 Q. Did he give you a card?

6 A. No. He wrote down a cellphone number, and he
7 didn't give me a card.

8 Q. Do you still have that information?

9 A. No.

10 Q. You threw it away?

11 A. I just lost track of it.

12 Q. How long were you with him that first time?

13 A. Well, we met over lunch, so maybe thirty-five
14 minutes or so.

15 Q. He paid for lunch?

16 A. Yes, he did.

17 Q. And he was taking notes of your conversation?

18 A. He was.

19 Q. What was he talking to you about?

20 A. Well, he just sort of wanted me to run through
21 the events as I remembered them.

22 Q. Did he refer to your testimony in the grand
23 jury at all?

24 A. I don't remember him referring to -- I remember

Page 10

1 him just sort of having a notepad, and I went
2 through the events of the night, and I'm pretty
3 sure that is all we did.

4 Q. Do you remember him referring to your
5 deposition testimony at all?

6 A. No.

7 Q. Do you remember him referring to the statement
8 you gave the police which has been marked as an
9 exhibit in your deposition today, Exhibit 3?

10 A. I kind of remember him mentioning that. We
11 didn't discuss it, but I remember him
12 mentioning that I had made a statement to the
13 state police.

14 Q. Do you remember him mentioning the affidavit
15 that you made in the other case which has been
16 marked as Exhibit 4 today?

17 A. Well, I remember him saying that or him asking
18 me who I have spoken with or who have I been
19 deposed by, and I told him I came in here once
20 and that I had done the grand jury thing.

21 Q. Did he say whether or not he knew you had been
22 deposed before?

23 A. No.

24 Q. Did he seem surprised when you told him you had

Page 10

1 come in here and been deposed?

2 A. No.

3 Q. Did he seem surprised when you told him that
4 you had done the grand jury thing?

5 A. No.

6 Q. And you were with him thirty-five minutes or
7 so; is that right?

8 A. Around then.

9 Q. Tell me what you remember him saying and what
10 you remember yourself saying during that
11 meeting.

12 A. Well, I remember we kind of introduced
13 ourselves. We didn't know each other, and he
14 asked me a similar scenario to when I meet with
15 people I don't know. They ask me if I'm in
16 school, what I'm studying, what kind of things
17 I like to do.

18 He mentioned that he just moved up here
19 with I don't know whether it was his wife or
20 fiancée, and I asked him if he had been skiing
21 and such and he said a little bit, and he asked
22 me where any good places were.

23 Q. To do what?

24 A. To go skiing, and I mentioned a few places that

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1 I liked, and then he, you know, he told me that
 2 he wanted me to run through the course of the
 3 evening as I remembered it.
 4 Q. So what did you do?
 5 A. I basically just told him what I remembered,
 6 starting from when I went to the dirt bike
 7 track until Scott dropped me off.
 8 Q. And what did he say during that?
 9 A. He didn't really say much. He just let me
 10 talk.
 11 Q. Just took notes?
 12 A. Yes.
 13 Q. Didn't ask you any questions?
 14 A. He may have. I don't remember him specifically
 15 asking any questions.
 16 Q. You just talked?
 17 A. Yes.
 18 Q. He said, "What happened? Tell me what
 19 happened?"
 20 A. Yes. I remember him saying that he wanted to
 21 hear the whole story from me as I remember it.
 22 So he just let me go through the events.
 23 Q. And did he stop you at any point to ask you
 24 questions, like how much did Jeff have to

Page 106

1 drink?
 2 A. Yes, he did. Well, I don't know if he asked me
 3 that question.
 4 I remember him stopping and asking me
 5 like, you know, you're going to be asked when
 6 you go into your deposition how many drinks
 7 Jeff had and such, when I got to that point in
 8 the narrative.
 9 Q. He told you that you would be asked that during
 10 the deposition; is that right?
 11 A. Yes.
 12 Q. And what did he say about that?
 13 A. He told me that what I remembered is what I
 14 needed to tell.
 15 Q. Now, did you tell him at that point that you
 16 had already been deposed and told what you
 17 remembered back in August of 2004?
 18 MR. GILLIS: Objection.
 19 A. I don't think so. I don't think I made
 20 reference to that.
 21 I think I might have said, "Well, I have
 22 already been deposed." I honestly don't know.
 23 I never told him that "I said this"
 24 because I didn't remember.

Page 10

1 Q. So when he told you that you were going to be
 2 asked when you go into the deposition how much
 3 Jeff had to drink, did he say anything else
 4 about that?
 5 A. I believe he asked me if I remembered any, you
 6 know, noticeable signs of him being drunk or --
 7 Q. "Noticeable signs"? Is that what he said?
 8 A. I don't know how he stated it.
 9 Q. What did you say?
 10 A. I believe I told him that I didn't see any
 11 clear signs of him being drunk.
 12 Q. What else did he say about that?
 13 A. Well, I don't know. I don't remember. I
 14 remember that.
 15 Q. What else do you remember him saying that day?
 16 A. I remember him saying that I, being the one
 17 that had not been drinking that night, was kind
 18 of a big factor in what, I guess, the final
 19 decision, how the case plays out.
 20 Q. He told you that?
 21 A. Yes. One thing I remember specifically about
 22 when I met with John DiNatale, I remember him
 23 specifically mentioning these words.
 24 He said, "Tell the truth and let the cards

Page 10

1 fall where they will."
 2 Q. Did you need DiNatale to tell you to tell the
 3 truth?
 4 MR. GILLIS: Objection.
 5 A. No.
 6 Q. Tell me what else Mr. Parkinson -- By the way,
 7 I asked you how old he was. He never gave you
 8 a card?
 9 A. No, he didn't.
 10 Q. Never told you where he worked?
 11 A. Well, he told me that he had just moved up
 12 here, and he said where he was living, but I
 13 don't remember.
 14 He said he was working in Boston or
 15 Cambridge or somewhere.
 16 Q. Working for Rare or representing Rare?
 17 A. Yes.
 18 Q. Did he tell you that he was a lawyer?
 19 A. Yes, an attorney or lawyer. He said he was
 20 representing Rare Hospitality.
 21 Q. Your best memory is that this conversation
 22 occurred in November?
 23 A. Yes.
 24 Q. And what else did you say to him or he say to

Page 109

1 you during that Panera Bread meeting?
 2 A. Well, he wanted to make sure that after I had
 3 gone through my narrative that he asked me if
 4 that's how I remember it and if there's
 5 anything else I remembered.

6 He wanted to make sure that I had told the
 7 story as I remembered it, and that was pretty
 8 much it.

9 Q. Then he met with you a second time; is that
 10 right?

11 A. He did.

12 Q. And how long after the first visit was it that
 13 you met with Mr. Parkinson again?

14 A. Maybe like two weeks.

15 Q. Where was that meeting?

16 A. It was the same place.

17 Q. Lunch again?

18 A. Yes.

19 Q. Mr. Parkinson paid again?

20 A. Correct.

21 Q. And did he have a document for you at that
 22 time?

23 A. He had talked to me on the phone, and I told
 24 him that I wanted to make some changes, and

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1 then he brought the document down so that I
 2 could make the changes and tell him what I
 3 wanted to change.

4 Q. So am I correct that in between the first
 5 meeting at Panera Bread and the second meeting,
 6 he sent you a document somehow?

7 A. No. If I said that, that's incorrect. He sent
 8 it after the second meeting.

9 Q. There was a second meeting with him?

10 A. Yes.

11 Q. At the second meeting, did he have a document
 12 with him?

13 A. Yes.

14 Q. Did you read the document at the second
 15 meeting?

16 A. Yes.

17 Q. There were things in it that were not right?

18 A. Yes. As I told you before, he made the
 19 mistake. It's not essential, but I wanted it
 20 to be right.

21 He said we were dirt biking in the
 22 Leominster area, and I said well, it was
 23 technically in Templeton.

24 So he said he wanted to make sure it was

Page 11

1 all correct. He wanted to have it done.

2 Q. Were there any other changes he wanted made in
 3 that document?

4 A. No.

5 Q. Did the document speak to how much Jeff had to
 6 drink that night?

7 A. Yes.

8 Q. And did the document speak to how much he had
 9 at the bar?

10 A. Yes. I think it more generally spoke about
 11 everything he had to drink as opposed to what
 12 he drank here and at the table.

13 Q. At the second meeting with Mr. Parkinson, did
 14 you discuss with him that you had already given
 15 statements, either in writing or under oath,
 16 before the grand jury or at a deposition about
 17 how much Jeff had had to drink?

18 A. What do you mean by "discussing"?

19 Q. Well, was there any discussion about whether or
 20 not the document that Mr. Parkinson wanted you
 21 to sign was going to align with the statements
 22 you had given earlier both in the grand jury
 23 and at deposition under oath and the written
 24 statements?

Page 11

1 A. When I ran through the narrative, I'm pretty
 2 sure I remember him saying, "Well, you know
 3 what you said here is along the lines of what
 4 has been said in the grand jury and what other
 5 people have said." It was something along the
 6 lines of that.

7 Q. Well, were you concerned at all with respect to
 8 the Parkinson document about whether or not
 9 what you were saying in the Parkinson document
 10 was going to align with what you had testified
 11 to at your deposition back in August?

12 A. Well, I didn't really remember what I had said
 13 in the deposition. So I could not really make
 14 a judgment on if there were going to be
 15 differences.

16 I just assumed that there was going to be
 17 what I thought happened.

18 MR. FARRAH: Why don't we take a break?
 19 (Luncheon recess.)
 20
 21
 22
 23
 24

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AFTERNOON SESSION

1 AFTERNOON SESSION

2

3 Q. So you had a second meeting with Mr. Parkerson;

4 is that correct?

5 A. Yes.

6 Q. And he presented you with a document to sign at

7 that meeting?

8 A. Yes, he did.

9 Q. You didn't like some of the things that were in

10 it; is that right?

11 A. Yes.

12 Q. So what did you do after that with respect to

13 Mr. Parkerson?

14 A. He went back to his office, and I'm not sure

15 what the time frame was, and he came up with a

16 new one and sent it to me, and I had to bring

17 it to the notary, sign it, and send it back to

18 him.

19 Q. Did you do that?

20 A. Yes.

21 Q. Did you keep a copy of that document?

22 A. No, I don't think so.

23 Q. And did you ever hear from Mr. Parkerson again?

24 A. No.

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1 Q. Now, do you remember testifying before the

2 grand jury?

3 A. Yes, I do.

4 Q. Do you remember being asked the question, "When

5 you were seated once your table was available,

6 do you know if you checked out at the bar, or

7 did the tab move to the table?"

8 Do you remember being asked that question?

9 MR. GILLIS: What page are you reading

10 from?

11 MR. FARRAH: 17.

12 A. I don't know.

13 Q. Do you remember your answer? Can you read it

14 into the record?

15 A. "I'm pretty sure we checked out at the bar."

16 Q. And do you have any explanation as to why your

17 testimony is now different from what you

18 testified to the grand jury on the question of

19 whether or not the bar tab went to the table?

20 MR. GILLIS: Objection.

21 A. No.

22 Q. Do you remember being asked the question before

23 the grand jury, "What do you believe Jeffrey

24 Southworth had to drink at the table that

Page 11

1 night?"

2 MR. GILLIS: Page, please?

3 MR. FARRAH: 19.

4 Q. Do you see that question?

5 A. Yes.

6 Q. Do you remember your answer? Can you read it

7 for the record?

8 A. "I would say that he probably, that he had

9 probably two to three beers and a couple of

10 Manhattans. I would say he had two beers,

11 maybe three. I can't specifically recall."

12 Q. Let's try that one more time. Could you read

13 it again?

14 A. "I would say he had probably two to three beers

15 and a couple of Manhattans. I would say he had

16 two, maybe three. I can't specifically

17 recall."

18 Q. And when you were saying "two, maybe three,"

19 were you referring to Manhattans in your grand

20 jury testimony?

21 A. I don't know.

22 Q. Do you have any explanation as to why your

23 testimony today with respect to how many beers

24 he drank at the table that night is different

Page 11

1 from what you testified to before the grand

2 jury?

3 MR. GILLIS: Objection.

4 A. The bill.

5 Q. Seeing the bill with Mr. DiNatale?

6 A. Just seeing the bill, I mean, shows that there

7 are two.

8 Q. Two beers that were served at the table?

9 A. Yes.

10 Q. One at 8:40 and the other one at 9:15?

11 A. Correct.

12 Q. What is it about those two beers that were

13 served at the table that is inconsistent with

14 your testimony before the grand jury that Jeff

15 probably had two to three beers with dinner at

16 the table?

17 A. Well, I said that there were two to three beers

18 drinking at the table, and there were only two

19 beers ordered to the table.

20 So I know that the three is out of the

21 question, and I believe that Scott was drinking

22 beer at the table as well.

23 So I can't say for sure, but I presume

24 that one of the beers ordered at the table in

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1 Exhibit 2 went to him but I didn't log it in.
 2 I can't say for sure.
 3 Q. You presume one of the beers that is shown on
 4 Exhibit 2 went to him while he was at the
 5 table?
 6 A. Yes.
 7 Q. And the other beer, you presume, went to Jeff
 8 while he was sitting at the table?
 9 MR. GILLIS: Objection.
 10 A. Yes.
 11 Q. So help me out with your testimony this morning
 12 that you had discussions with Mr. DiNatale
 13 about the beers reflected on Exhibit 2 are the
 14 beers that were served at the bar.
 15 A. What is that again?
 16 Q. Before you saw what has been marked as
 17 Exhibit 2, you testified at the grand jury that
 18 your best memory was Jeff had two to three
 19 beers while he was sitting at dinner; is that
 20 right?
 21 MR. GILLIS: Objection.
 22 A. Yes.
 23 Q. Do you see it?
 24 A. Yes.

1 deposition; is that right?
 2 A. Yes.
 3 Q. And before you saw Exhibit 2, your best memory
 4 about how many beers Jeff had at the bar is
 5 what is reflected in your deposition; is that
 6 right?
 7 MR. GILLIS: Objection.
 8 A. Yes.
 9 Q. Now, Exhibit 2 indicates that the check was
 10 paid at 9:57 p.m. Do you see that?
 11 A. Yes.
 12 Q. And after paying the check, where did you go?
 13 I'm sorry. You did not pay for yourself; is
 14 that right?
 15 A. Correct.
 16 Q. Jeff paid for you?
 17 A. Yes.
 18 Q. Once the check was paid, you left the
 19 restaurant; is that right?
 20 A. Yes.
 21 Q. And that was about 9:57 p.m.; is that right?
 22 MR. GILLIS: Objection.
 23 A. Yes, or shortly after.
 24 Q. And where did you go?

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Page 12

1 Q. Before you saw Exhibit 2, you testified at your
 2 deposition that Jeff had maybe four beers while
 3 he was sitting at the table; is that correct?
 4 MR. GILLIS: Objection.
 5 Q. Do you remember that testimony?
 6 A. Yes. It's in here.
 7 Q. And before you saw Exhibit 2, you gave a
 8 written statement to Trooper Sullivan, which
 9 has been marked as Exhibit 3 in this
 10 deposition, that Jeff had a couple of beers,
 11 maybe two, and three drinks at dinner. Do you
 12 see that?
 13 A. Yes.
 14 Q. And is it accurate to say that except for what
 15 you believe Exhibit 2 shows, your earlier
 16 testimony regarding the number of beers he had
 17 at the table is your best memory of what he had
 18 at the table?
 19 MR. GILLIS: Objection.
 20 A. Yes.
 21 Q. Before you saw Exhibit 2, your best memory
 22 regarding the number of Jack Daniels Manhattans
 23 that Jeff had with dinner is what is reflected
 24 in your grand jury testimony and your

1 A. We went to the hotel that the two people that I
 2 didn't know were staying at.
 3 Q. And had the seating arrangement in the car
 4 changed or the truck changed at that point?
 5 A. Yes.
 6 Q. You were in the front; is that right?
 7 A. I think so, yes.
 8 Q. Jeff was in the back with his dogs; is that
 9 right?
 10 A. Yes.
 11 Q. Can you tell me why Jeff went in the back with
 12 the dogs?
 13 A. Other than the fact that the dogs are
 14 Rottweilers and they had been in the truck for
 15 quite some time, you know, maybe he wanted -- I
 16 can't say. I don't know.
 17 Q. Did he say anything about why he wanted to go
 18 in the back with the dogs?
 19 A. No.
 20 Q. Did he fall asleep in the back with the dogs
 21 during the trip out of the Longhorn?
 22 A. No.
 23 Q. And where did you go from there?
 24 A. To the hotel.

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1 Q. Which hotel?

2 A. I think it's called the Four Points or Four

3 Seasons or Four something.

4 Q. And what did you do there?

5 A. The two people that were staying there, they

6 wanted to go change or they went into their

7 room, and we were waiting outside in the

8 hallway, and we were talking to these two guys

9 that were there.

10 There was a music festival that was going

11 on at the airport next to the hotel. So there

12 were a lot of people staying there, and there

13 were two bouncers or security guards for a

14 certain band who we were talking to out in the

15 hall.

16 Q. And where was Jeff while you guys were at the

17 Four Points Hotel?

18 A. He was in the hallway with us.

19 Q. By the way, just a few wrap-up type questions.

20 I may have asked you this already.

21 What was the age of the waitress who

22 served you guys?

23 MR. GILLIS: Objection.

24 Q. Can you estimate for me the age of the waitress

Page 122

1 that served you guys?

2 A. Early to mid twenties.

3 Q. Okay, and do you have a memory of whether or

4 not any other waitresses or waiters served your

5 table that night?

6 A. I don't believe so.

7 Q. Did you say you had steak that night or ribs?

8 A. I think I told you I had ribs.

9 Q. Do you remember you had ribs or are you not

10 sure?

11 A. I thought I had ribs. I'm not 100 percent sure

12 on it.

13 Q. Okay. You were not wearing a watch that night;

14 is that right?

15 A. Yes.

16 Q. And did Jeff have anything to drink while you

17 were at the Four Points?

18 A. He did.

19 Q. What did he have there?

20 A. He had a beer.

21 Q. Twelve-ounce? Sixteen-ounce? Do you know?

22 A. I think it was a twelve-ounce. I'm pretty sure

23 it was a can.

24 Q. And am I correct -- I think I asked you this

Page 12

1 already. I know I asked you in the Superior

2 Court case. The size of the container of the

3 beers that Jeff had or whatever amount of beer

4 he had at the bar and whatever amount he had at

5 the table, they were all in the same size

6 container; is that right?

7 MR. GILLIS: Objection.

8 A. Yes.

9 Q. Were they all in the same size container -- the

10 beers at the table and the beers at the bar?

11 MR. GILLIS: Objection.

12 A. I believe so.

13 Q. And then from the hotel, where did you all go?

14 A. We went to the Other Side, which is a strip

15 club.

16 Q. Approximately, how long were you at the hotel,

17 best memory?

18 A. Anywhere from half an hour to forty minutes.

19 Q. Okay, and how long did it take you to get from

20 the Longhorn to the hotel?

21 A. Maybe like five minutes. It's pretty close.

22 Q. Do you remember testifying ten to fifteen

23 minutes before?

24 A. I think so.

Page 12

1 MR. GILLIS: What page?

2 MR. FARRAH: Page 53.

3 Q. Is it is your best memory as you sit here today

4 it was ten minutes more or less?

5 MR. GILLIS: Objection.

6 A. Yes.

7 Q. And then you drove from the hotel to the strip

8 club; is that right?

9 A. Correct.

10 Q. Who was in the car when you did that?

11 A. It was myself, Scott, his brother Mike and

12 Jeff.

13 Q. Had Mike been in the car on the trip from the

14 Longhorn to the hotel?

15 A. He was not.

16 Q. What was the seating arrangement in the ride

17 from the hotel to the strip club?

18 A. I was in the passenger seat, and Scott was

19 driving, and Jeff and Mike were in the back.

20 Q. Was Jeff asleep on the ride to the strip club?

21 MR. GILLIS: Objection.

22 A. I don't think so.

23 Q. Was the plan initially to go into the strip

24 club?

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Page 12

1 A. It was.
 2 Q. But that changed at some point in time; is that
 3 right?
 4 A. Yes.
 5 Q. And what brought about that change?
 6 A. Well, I actually didn't even want to go to
 7 dinner. I wanted to go back, so Jeff offered
 8 to buy me dinner and I said yes, and then when
 9 we were going there, I probably said something
 10 like I had class in the morning.
 11 I honestly don't remember how we came to
 12 the decision, but I think Scott and I decided
 13 we didn't want to stay out too much later.
 14 Q. Okay, and so you guys did not go to the strip
 15 club; is that right?
 16 A. Correct.
 17 Q. But you dropped off Scott's brother there; is
 18 that right?
 19 A. Yes.
 20 Q. And then where did you go from the Other Side?
 21 A. We went to the apartment or housing complex
 22 where Scott's truck was in Littleton.
 23 Q. Approximately, how long did it take you guys to
 24 go from the Other Side to the apartment complex

1 if I had my bag with me.
 2 I know I had to grab something, some sort
 3 of dirt biking gear. It might have been my
 4 boots or something. I jumped off and brought
 5 it over to Scott's truck.
 6 Q. Then what happened?
 7 A. Jeff left.
 8 Q. Jeff left the apartment complex?
 9 A. Correct.
 10 Q. So he left the back seat and got into the
 11 driver's side?
 12 A. Yes.
 13 Q. Did something happen when Jeff was leaving the
 14 apartment complex?
 15 A. Yes.
 16 Q. What happened?
 17 A. Actually, I didn't see it, but apparently, he
 18 must have backed over or ran over part of
 19 Scott's foot.
 20 Q. Did you hear Scott say something as Jeff was
 21 leaving or soon after Jeff left?
 22 A. Yes, soon after.
 23 Q. What did he say?
 24 A. He started complaining about his ankle hurting,

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Page 12

1 in Littleton?
 2 A. Maybe thirty to thirty-five minutes.
 3 Q. And the apartment complex is just off of
 4 Route 495; is that right?
 5 A. Yes.
 6 Q. And was there any discussion on route between
 7 some or all of the three about whether or not
 8 Jeff should drive his truck?
 9 A. Not that I remember.
 10 Q. Do you remember anyone saying in effect, "Jeff,
 11 you're too drunk to drive"?
 12 MR. GILLIS: Objection.
 13 A. No.
 14 Q. Where was Jeff on the ride from the Other Side
 15 to the apartment complex?
 16 A. He was in the back.
 17 Q. Still in the back?
 18 A. Yes.
 19 Q. Sleeping or awake?
 20 A. He was awake, I'm pretty sure.
 21 Q. And when you got to the apartment complex, what
 22 happened?
 23 A. Well, I jumped out and I grabbed my bag off the
 24 back of the truck, and actually, I don't know

1 and he said that he backed over it, ran over
 2 it.
 3 Q. Do you remember while you were at the
 4 restaurant the waitress asking anyone in your
 5 group for an ID, some proof of age?
 6 A. I don't recall.
 7 Q. Do you remember? That is my question.
 8 A. I do not remember anyone being IDed.
 9 Q. Do you remember anyone being IDed at the bar?
 10 A. Well, I don't remember that either.
 11 Q. Okay. Now, after Scott made some statement
 12 about Jeff running over his foot, what happened
 13 next?
 14 A. We went to get into Scott's truck, and he
 15 realized he didn't have his keys.
 16 Q. Okay. So what happened at that point?
 17 A. We tried calling Jeff to let him know that he
 18 had to turn around and bring us the keys.
 19 Q. And you called from a cellphone; is that right?
 20 A. Yes.
 21 Q. How long did it take you to get through to
 22 Jeff?
 23 A. Maybe five, ten minutes.
 24 Q. And what was the conversation that you had with

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Page 13

Jeff at that point? Was it you, by the way,
that had the conversation?

A. I believe it was. I know from that point on,
there were two conversations with him.

Q. Tell me about the first one.

A. I told him that he had the keys -- he had
Scott's keys -- and that he had backed over
Scott's foot when he was leaving.

Q. And what did Jeff say?

A. He didn't say much. I don't even quite
remember him telling me he was going to turn
around.

Q. And again, the apartment complex which in the
parking lot of which you were calling Jeff from
that night was located how far from Route 495?

A. One hundred yards.

Q. And so after that conversation with Jeff, did
you see Jeff later on that night?

A. No.

Q. At some point in time after that conversation
with Jeff, did you try to have another
conversation with him? Did you try to call him
on the phone?

A. Yes.

1 A. Yes.

2 Q. What did you do?

3 A. We broke into the truck by smashing out the
4 sliding glass door in the back windshield.

5 Q. On the back?

6 A. Yes. We knew he had a spare key in the car.

7 Q. And after you had cleared away whatever you
8 needed to clear away to get into the car, what
9 did you do next?

10 A. I don't know whether we had talked to Jeff at
11 that point or we started driving.

12 We must have talked to him again by that
13 point because we would have just gone back
14 home.

15 Q. Do you remember having a second conversation
16 with Jeff that night after he left the
17 apartment complex parking lot?

18 A. Yes.

19 Q. Was that conversation with you or with Scott?

20 A. I believe it was with me.

21 Q. Tell me what you remember about that
22 conversation.

23 A. I remember him saying -- Yes, it was with me.
24 I remember him saying he had been in an

Page 130

Page 13

1 Q. Did you wait for Jeff to come back?

2 A. We did.

3 Q. Can you tell me approximately how long you
4 waited for Jeff to come back?

5 A. Probably close to twenty minutes.

6 Q. Do you remember testifying at your
7 deposition -- this is on page 66 -- that it was
8 probably maybe half an hour that you waited?

9 A. Okay.

10 Q. Do you see that?

11 A. It could have been a half an hour. I'm sure
12 that this is more accurate than what I remember
13 today.

14 Q. Your deposition?

15 A. Yes.

16 Q. In all respects?

17 MR. GILLIS: Objection.

18 A. In that respect at least.

19 MR. GILLIS: I move to strike that last
20 comment.

21 MR. FARRAH: I thought we were reserving
22 motions to strike until trial.

23 Q. At some point in time did the two of you take
24 some action to be able to drive the truck?

1 accident and that I was like immediately,
2 "Where are you," and he didn't really say that
3 much.

4 I'm pretty sure it got cut off, and we
5 decided to go try and find the accident. We
6 didn't know what happened.

7 Q. So was it at that point that you got on 495?

8 A. Yes.

9 Q. If you had been heading home that night as
10 opposed to looking for Jeff, which way would
11 you have headed on 495 from the apartment
12 complex?

13 A. We would not have gotten on 495.

14 Q. At all?

15 A. Correct.

16 Q. When you got on 495, in which direction did you
17 head?

18 A. North.

19 Q. Why was that?

20 A. Jeff was going home, which was north.

21 Q. Where did you understand he lived at that time?

22 A. In Portsmouth.

23 Q. New Hampshire?

24 A. Yes.

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1 Q. And when you got on 495 North, what happened?

2 A. Well, we drove and we didn't see anything and

3 we were going to turn around, and then we

4 decided to drive a little bit farther, and as

5 we were getting close to the Westford exit, we

6 saw an accident scene with like all sorts of

7 ambulances and police cars and just a lot of

8 emergency vehicles, lights going on the

9 southbound side.

10 Q. The southbound side of 495?

11 A. Yes.

12 Q. How many exits down from where the apartment

13 complex was, was it that you had traveled

14 before you saw the accident scene?

15 A. I think Westford is two up from where we got

16 on.

17 Q. Had you passed the Westford exit when you saw

18 this accident scene?

19 A. No.

20 Q. So this was before the Westford exit on 495

21 North that you saw the accident scene on the

22 other side of the highway; is that right?

23 A. Yes.

24 Q. What did you do?

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1 A. We got off at the Westford exit, and we started

2 heading southbound so we could drive by the

3 accident.

4 Q. Did you call Jeff at all during that time?

5 A. Yes.

6 Q. And were you able to reach him at all?

7 A. No.

8 Q. What did you see when you drove by on 495

9 southbound now?

10 A. We couldn't see anything. It looked like an

11 accident. All we could see was police cars and

12 the police and EMTs and ambulances.

13 We didn't see any cars that had been in an

14 accident, specifically the truck. That was

15 what we were looking for and the dirt bikes.

16 Q. And did you make any other efforts to find Jeff

17 that night?

18 A. Yes.

19 Q. What were those efforts? Describe those for

20 me, if you could.

21 A. We circled back up north to get off of the

22 Westford exit again.

23 Q. Then what happened?

24 A. No, that's incorrect. We didn't circle back

Page 13

1 yet. We got off at the Littleton exit.

2 We drove on this back road and tried

3 calling him and telling him. I think we left

4 him a voice mail saying, "Where are you? Are

5 you all right? Give us a call. Let us know

6 what is going on," but we could not get ahold

7 of him.

8 So what we did was we decided to drive up

9 to Westford again one more time to see if we

10 could see if that was his accident, if we could

11 see his truck.

12 Q. Did you have any luck?

13 A. No.

14 Q. Prior to September 26, 2003, had you ever seen

15 Jeff when you believed he was under the

16 influence of alcoholic beverages?

17 A. I think so once.

18 Q. Did he exhibit some of the same signs you saw

19 the night of September 26, 2003 that night?

20 MR. GILLIS: Objection.

21 A. You know, I'd seen him when I thought he was a

22 little bit drunk, but I mean I just assumed

23 that he was drunk. I cannot say that he was.

24 It was at that party that I mentioned before.

Page 13

1 Q. Were people drinking at that party?

2 A. Yes. That's why I assumed he was drunk.

3 Q. What sorts of things did he exhibit that led

4 you to assume he was drunk?

5 A. Well, I didn't notice anything he was

6 exhibiting. I sort of just figured that he was

7 drunk or on his way to being drunk since he had

8 been at the party and other people were there,

9 and they were drinking.

10 Q. Was he louder than usual at that party?

11 A. I didn't notice him being loud.

12 Q. Were his eyes glassy at all at the party?

13 A. I could not tell you.

14 Q. What is it that led you to say a few moments

15 ago that he had exhibited signs of intoxication

16 in the past to you?

17 A. Actually, I remember one thing. When we went

18 outside, he was getting one of his dogs all

19 riled up.

20 They're Rottweilers. So they can be

21 nasty. I mean they're pretty good dogs.

22 I remember him getting one of them all

23 riled up and like kind of pointing to someone

24 because he was a very well-behaved dog, and if

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1 you pointed at someone and you started going
 2 after them, say you grabbed his arm, the dog
 3 would jump up on him and try to think he needed
 4 to protect him, and I remember that happened.
 5 That was something that he normally didn't do.
 6 Q. My question to you is, what is it that he was
 7 exhibiting that night prior to September 26,
 8 2003 that leads you to say he was exhibiting
 9 signs of being intoxicated?
 10 A. It would be getting his dog all riled up.
 11 Q. Anything else?
 12 A. No.
 13 Q. You're sure?
 14 A. Yes. I was not really paying attention that
 15 well. I was not even there that long.
 16 Q. But you believed he was exhibiting signs of
 17 intoxication that night; is that right?
 18 A. Yes.
 19 Q. Okay. Now, at some point in time, did you meet
 20 with the police to talk about the events of
 21 September 26?
 22 A. The state police?
 23 Q. Any police.
 24 A. I remember going to the state police in Concord

1 A. Yes. I remember him calling me and telling me
 2 that he wanted me to meet with him, and he
 3 could come down or I could come down and meet
 4 him, and I said I would come down, and I think
 5 it was the same day that I talked to him and
 6 went down there.
 7 Q. But it was five weeks after the accident?
 8 A. Yes.
 9 Q. That refreshes your memory?
 10 A. Yes.
 11 Q. In between that time, September 26, 2003 and
 12 November 2, 2003, did you give anybody else any
 13 statements about the accident?
 14 A. I don't think so.
 15 Q. Or about that night, did you give anybody else
 16 any statements about that night?
 17 A. No.
 18 Q. When did you learn that Jeff had been in this
 19 accident?
 20 A. It was the next day. A friend of mine called
 21 me and told me that he saw the accident on the
 22 news and that he saw something about Jeff being
 23 in an accident on the news.
 24 Q. Can you just describe how it was that you gave

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1 and talking to one of the troopers.
 2 Q. Trooper Sullivan?
 3 A. Yes.
 4 Q. How long was that after the accident?
 5 A. I think it was pretty short. I can't say for
 6 sure. It was a couple of days.
 7 Q. Did you tell him what had happened that night?
 8 A. I told him a little about what happened, but he
 9 wanted me to just write it all down.
 10 Q. Okay, and did you write it all down for him?
 11 A. Yes.
 12 Q. Now, what has been marked as Exhibit 3 in your
 13 deposition has a date of November 2, 2003,
 14 3:25 p.m. Do you see that?
 15 A. Yes.
 16 Q. That's five-and-a-half weeks, six weeks after
 17 the accident; can we agree?
 18 A. Yes.
 19 Q. Do you remember that you had met with him
 20 before November 2, 2003? This is Trooper
 21 Sullivan.
 22 A. No.
 23 Q. Do you remember only one meeting with
 24 Trooper Sullivan?

1 this statement to the state police?
 2 A. Yes. I went into the barracks and I had to
 3 give them some ID and show them who I was, and
 4 they took me into one of the offices and sat me
 5 down and asked me if I was with Jeff that night
 6 and if I was in fact Jude and some questions
 7 like that.
 8 Then he said, "All right. Now, I want you
 9 to write what you remember down and give me a
 10 statement on paper."
 11 Q. And that's what you did?
 12 A. Yes.
 13 Q. How long were you with him that day?
 14 A. It was probably under an hour. It was not
 15 extremely long.
 16 Q. Anybody else there besides the trooper and you?
 17 A. No.
 18 Q. Was your meeting tape recorded, do you know?
 19 A. I don't know.
 20 Q. Was your meeting with DiNatale tape recorded?
 21 A. I don't think so.
 22 Q. How about with the lawyer -- I can't remember
 23 his name now -- Parkerson, was that tape
 24 recorded?

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1 A.I don't think so.
 2 Q.Did anybody ask you for permission to tape
 3 record in any of the meetings you had to
 4 discuss what happened?
 5 A.I kind of remember someone asking me, but I
 6 don't know whether it was one of these meetings
 7 or a meeting where I was in a place in here.
 8 Maybe it might have been when I had to
 9 testify -- I can't say for sure. I just
 10 remember someone saying, "I'm going to be tape
 11 recording you."
 12 Q.Is that your handwriting on Exhibit 3?
 13 A.Yes.
 14 Q.And did anybody in any way influence what you
 15 wrote on Exhibit 3 at the time you were writing
 16 it?
 17 A.No.
 18 Q.Did anybody put words in your mouth?
 19 A.No.
 20 Q.Did anybody suggest anything to you?
 21 A.No.
 22 Q.And then you testified at the grand jury; is
 23 that right?
 24 A.Yes.

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1 Q.And did you testify truthfully before the grand
 2 jury to the best of your ability?
 3 A.Yes.
 4 Q.And approximately how long was that after the
 5 meeting with the state trooper, if you know?
 6 A.I don't know. I think it was sometime after.
 7 Q.And then in between then, when you testified
 8 before the grand jury and when you testified at
 9 your deposition in August of 2004, did anybody
 10 that you understood was representing anyone
 11 involved in either a civil or criminal lawsuit
 12 contact you to discuss what happened the
 13 evening of September 26, 2003?
 14 A.No.
 15 Q.And when you came to testify on August of 2004,
 16 that was the first time we had spoken?
 17 A.Yes.
 18 Q.After testifying on August of 2004, and with
 19 the exception of Mr. Parkerson and
 20 Mr. DiNatale, has anyone spoken to you about
 21 the events of September 26, 2003 whom you have
 22 understood was working for any defendant in any
 23 civil lawsuit?
 24 A.No.

1 MR. FARRAH: Michael, I think I'm just
 2 about done. Give me a minute to run out and
 3 I'll be right back.
 4 (Short recess.)
 5 Q.Did you sign a statement for DiNatale?
 6 A.No.
 7 Q.You did sign a statement for Parkerson?
 8 A.Yes.
 9 Q.You're sure you didn't sign a statement for
 10 DiNatale?
 11 A.I don't remember. I don't know.
 12 Q.It was not that long ago -- two weeks.
 13 A.It was a little bit longer than that.
 14 Q.But you don't remember?
 15 A.I don't remember.
 16 MR. FARRAH: Thanks. I'm done.
 17
 18 CROSS-EXAMINATION
 19
 20 BY MR. GILLIS:
 21 Q.Mr. Connolly, you have in front of you
 22 Exhibit 3, your statement there, and when you
 23 said in that statement that he had a couple of
 24 beers, maybe two and maybe three drinks, that

1 was the total amount of drinks that you think
 2 he might have had at the restaurant; is that
 3 right?
 4 MR. FARRAH: Objection.
 5 A.Correct.
 6 Q.Let me ask it a different way. From looking at
 7 your statement, can you tell me how many drinks
 8 you thought Mr. Southworth maybe had at the
 9 restaurant?
 10 A.In total?
 11 MR. FARRAH: Objection. Are you looking
 12 at Exhibit 3?
 13 MR. GILLIS: Yes.
 14 A.It would be maybe five.
 15 Q.Was that everything at the restaurant or just
 16 at the table?
 17 MR. FARRAH: Objection.
 18 A.I believe that was at the restaurant, not at
 19 the table.
 20 Q.Is it your memory that the beers that were
 21 gotten at the bar were brought over to the
 22 table?
 23 MR. FARRAH: Objection.
 24 A.Yes.

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1 Q. This is dated November 2, 2003. That's when
2 that was actually done by you, correct?

3 A. Yes.

4 Q. Your memory was a lot fresher back then as to
5 the events of this, correct?

6 A. Yes.

7 Q. You said that you left approximately 11:00, is
8 that correct, the restaurant?

9 A. Yes.

10 Q. Give or take a few minutes?

11 A. Yes.

12 Q. It could have been 10:30; it could have been
13 11:30?

14 MR. FARRAH: Objection.

15 A. It was probably not later. It was probably,
16 you know, 11:00 or before.

17 Q. Subsequently, you were under oath when you gave
18 your grand jury testimony, correct?

19 A. Yes.

20 Q. You said "probably two, maybe a couple of
21 Manhattans" on page 9 of your sworn testimony.

22 A. Correct.

23 Q. At the end of that you were asked, were you
24 not, whether or not Mr. Southworth was

1 Q. You had known him long enough to know whether
2 his demeanor was changing, correct?

3 MR. FARRAH: Objection.

4 A. The only time that I believed that he was drunk
5 was the time that I had seen him at the party.

6 Q. That was not the question. You've known him
7 long enough that you would be able to tell
8 whether or not his demeanor was changing on the
9 night of September 26, 2003, correct?

10 A. Yes.

11 Q. Now, those are the statements that you gave
12 before lawyers got involved in the case,
13 correct?

14 A. Yes.

15 Q. Then you met with Mr. Farrah, correct?

16 MR. FARRAH: Objection.

17 A. Yes.

18 Q. When did you first meet with him?

19 A. It was over a year. I honestly don't know.

20 Q. How many times have you met with Mr. Farrah?

21 A. Only once, besides today.

22 Q. When was that?

23 A. I don't know. It was sometime after the grand
24 jury.

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1 exhibiting any change in his demeanor at any
2 time? Do you remember being asked that?

3 MR. FARRAH: What page is that?

4 MR. GILLIS: Page 34.

5 A. Yes.

6 Q. That was a lot closer to the time of this
7 accident than today, correct?

8 A. Correct.

9 Q. Did they put your statement in as an exhibit
10 when you were at the grand jury?

11 A. Yes.

12 Q. That was the fifth of November of 2003,
13 correct?

14 A. Yes.

15 Q. That was when you said that there was no change
16 at any time in his demeanor while he was at the
17 Longhorn; is that correct?

18 A. Yes.

19 Q. You testified there that you had known him for
20 about a year prior to this accident, correct?

21 A. Yes.

22 Q. Do you know him primarily from dirt bike
23 racing, or how did you know him?

24 A. I knew him from dirt bike racing.

1 Q. Before your deposition?

2 MR. FARRAH: Are you asking him did we
3 meet before his deposition?

4 MR. GILLIS: Yes.

5 MR. FARRAH: Objection to the form.

6 A. The deposition, was that the grand jury?

7 MR. FARRAH: This is your deposition,
8 right here (pointing to transcript).

9 A. When was this taken? I thought the deposition
10 was when I met with Mr. Farrah.

11 Q. You came in before a situation like this and
12 gave a deposition?

13 A. Yes.

14 Q. Prior to that, had you met with anybody from
15 Mr. Farrah's office?

16 A. No.

17 Q. Then you met with his office, didn't you, to
18 put together an affidavit?

19 A. Yes.

20 Q. Who wrote that up for you?

21 A. I don't know.

22 Q. Who contacted you and asked you to do an
23 affidavit for them? Was that Mr. Farrah's
24 office?

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1 A. Yes.
 2 Q. And did they send you that in the mail, or did
 3 you come in to sign it?
 4 A. They sent it to me.
 5 Q. Do you know who from the office you spoke with?
 6 A. No. I presume it was Mr. Farrah.
 7 Q. Was it a male or a female?
 8 A. I don't know.
 9 Q. Do you remember what you spoke about?
 10 A. Just, you know, they were going to send it to
 11 me and I needed to sign it and get it back to
 12 them.
 13 Q. You also testified at trial in this matter,
 14 correct?
 15 A. Correct.
 16 Q. And you were under oath at that time, correct?
 17 A. Correct.
 18 Q. You didn't have any of the lawyers in this room
 19 forming the questions that you were answering,
 20 correct?
 21 A. Correct.
 22 Q. At that trial do you remember testifying that
 23 you had a Sprite and some food at the
 24 restaurant?

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1 A. Yes.
 2 Q. Do you remember testifying that there was
 3 nothing unusual at all that evening at the
 4 Longhorn as to how Mr. Southworth was speaking
 5 or walking?
 6 MR. FARRAH: Objection.
 7 A. Yes.
 8 Q. Do you remember testifying that Mr. Southworth
 9 brought the beer that he got at the bar with
 10 him to the table?
 11 MR. FARRAH: Objection.
 12 A. Yes.
 13 Q. Prior to Mr. Farrah in 2004 suggesting
 14 different signs of inebriation, did you ever
 15 testify anywhere that Mr. Southworth showed any
 16 signs of inebriation that evening?
 17 A. I don't believe so.
 18 Q. You didn't say it to the police, correct?
 19 A. No.
 20 Q. You didn't put it in your statement, did you?
 21 A. No.
 22 Q. You didn't say it at the grand jury, did you?
 23 A. No.
 24 Q. You didn't testify at trial to that, did you?

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1 A. No.
 2 Q. In fact, when you were asked the first time by
 3 Mr. Farrah what signs were exhibited, you said,
 4 "I don't know"; isn't that correct?
 5 MR. FARRAH: Objection.
 6 Q. Page 49, "What did he show? What did he
 7 manifest that makes you say that?" "I don't
 8 know."
 9 That's the first part of your answer,
 10 correct?
 11 A. Yes.
 12 Q. It was not until he suggested to you that he
 13 was sloppier that you said, "A little bit,
 14 yes," correct?
 15 MR. FARRAH: Objection. The record is the
 16 record.
 17 A. Correct.
 18 Q. It was not until he suggested that he was
 19 louder that you said yes, correct?
 20 MR. FARRAH: Objection.
 21 A. Correct.
 22 Q. It was not until he suggested that he was
 23 boisterous that you ever thought about it as a
 24 possibility, correct?

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1 MR. FARRAH: Objection.
 2 A. Correct.
 3 Q. But even then you said he was not boisterous,
 4 correct?
 5 MR. FARRAH: Objection.
 6 A. Correct.
 7 Q. You said his speech was not slurred, correct?
 8 A. Correct.
 9 Q. And when Mr. Farrah asked about his glassy
 10 eyes, you said, "I don't remember specifically
 11 seeing his eyes." Do you remember saying that?
 12 MR. FARRAH: Objection.
 13 A. Yes.
 14 Q. As you sit here today, can you honestly say
 15 whether or not his eyes were glassy that
 16 evening?
 17 MR. FARRAH: Objection.
 18 A. No.
 19 Q. Prior to Mr. Farrah suggesting these things in
 20 the deposition, you've never told anybody that
 21 he had glassy eyes, correct?
 22 MR. FARRAH: Objection.
 23 A. No.
 24 Q. You never told anybody that he was louder than

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Page 15

1 normal, correct?
 2 MR. FARRAH: Objection.
 3 A. No.
 4 Q. You never told anybody that he was sloppier
 5 looking than he usually is, correct?
 6 MR. FARRAH: Objection.
 7 A. No.
 8 Q. Now, I know that you've tried your best at
 9 these various times to give the best answers
 10 that you can, but I want you to think back.
 11 From the time that you gave testimony at
 12 the grand jury saying nothing changed about his
 13 demeanor to the time that you testified at your
 14 deposition with Mr. Farrah back in 2004, did
 15 you learn anything that changed your opinion of
 16 what happened that evening?
 17 MR. FARRAH: Objection.
 18 A. No.
 19 Q. By the way, was anyone from Rare there at that
 20 deposition, do you remember?
 21 A. I don't know.
 22 Q. Now, the first time that you were asked what
 23 Mr. Southworth had to drink that evening, you
 24 said, I believe, that he had a beer; isn't that

1 Q. You didn't have anything to drink at the sand
 2 pit, correct, any alcohol?
 3 A. No.
 4 Q. Mr. Southworth didn't have any alcohol at the
 5 sand pit, correct?
 6 A. No.
 7 Q. In fact, you guys bring jugs of water instead,
 8 correct?
 9 A. Yes.
 10 Q. Now, when Mr. Farrah was asking you these
 11 questions without Rare being at the deposition
 12 a year and a half ago, he asked you whether or
 13 not someone paid the bar tab, correct?
 14 A. Yes.
 15 Q. And you told him back then a year and a half
 16 ago that the bar tab was transferred to the
 17 check, correct?
 18 MR. FARRAH: Objection.
 19 A. Yes.
 20 Q. I'm going to show you testimony on page 35 and
 21 ask you to read that page. Just read it
 22 quickly. Read it to yourself.
 23 (Witness reviews document.)
 24 Q. Is it your memory that the beers that were

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Page 15

1 correct?
 2 A. Yes.
 3 MR. FARRAH: What page are we talking
 4 about?
 5 MR. GILLIS: Page 28.
 6 Q. "What did you see him drink?" "He had a beer,"
 7 correct?
 8 A. Yes.
 9 MR. FARRAH: Objection.
 10 Q. Prior to Mr. Farrah suggesting that he might
 11 have had more at that time, did you ever
 12 testify to anybody that he had more than a beer
 13 at the bar that evening?
 14 MR. FARRAH: Objection.
 15 A. No.
 16 Q. In fact, he didn't even have a full beer at the
 17 bar, did he? He brought it to the table,
 18 correct?
 19 MR. FARRAH: Objection.
 20 A. Correct.
 21 Q. Was the first beer that he got at the bar the
 22 first one he took over to the table?
 23 MR. FARRAH: Objection.
 24 A. As far as I know.

1 gotten at the bar were added on to the check at
 2 the table?
 3 MR. FARRAH: Objection.
 4 A. Yes.
 5 Q. And that's sworn testimony you gave to
 6 Mr. Farrah a year and a half ago, correct?
 7 A. Correct.
 8 Q. That was a year and a half before you met
 9 Mr. DiNatale, correct?
 10 A. Yes.
 11 Q. Do you remember telling Mr. Farrah that
 12 Mr. Southworth ordered a beer with his dinner?
 13 MR. FARRAH: Where are we talking about?
 14 I object.
 15 A. I don't remember the question.
 16 Q. By the way, do you remember telling Mr. Farrah
 17 that you ordered a steak; you were positive
 18 about that?
 19 A. No.
 20 Q. Let me show you the bottom of page 46 and top
 21 of page 47 at your prior deposition. Look at
 22 that.
 23 (Witness reviews document.)
 24 MR. FARRAH: What is the question?

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Page 15

1 Q. Does that refresh your recollection of what you
2 had to eat that night?

3 A. Yes.

4 Q. You said earlier in the deposition that you saw
5 Mr. Southworth get up and go to the bathroom,
6 correct?

7 A. Yes.

8 Q. Did you observe him walking to and from the
9 bathroom?

10 A. Yes.

11 Q. The bathroom is in the back corner; isn't that
12 right?

13 A. Yes.

14 Q. The hallway leading to the bathroom doesn't
15 lead to any other part of the restaurant,
16 correct?

17 A. Correct.

18 Q. You can't get to the bar by going to the
19 bathroom, correct?

20 A. Yes.

21 Q. Was he walking fine when you saw him go to the
22 bathroom?

23 A. Yes.

24 Q. Did you see him stagger at all?

1 A. Correct.

2 Q. Nobody that night at the table said to anyone
3 else that they thought they were intoxicated,
4 correct?

5 MR. FARRAH: Objection.

6 A. No.

7 Q. You told that to Mr. Farrah, didn't you, a year
8 and a half ago?

9 MR. FARRAH: What page are we talking
10 about?

11 MR. GILLIS: 42.

12 A. No.

13 Q. That's your memory today, correct?

14 A. Yes.

15 Q. Nobody at the table thought that anybody else
16 was intoxicated, correct?

17 MR. FARRAH: Objection. That's not what
18 he testified to. I'm objecting.

19 A. No.

20 Q. You told him back then that Jeff was not
21 particularly loud; isn't that correct?

22 A. Correct.

23 Q. Was he any louder than anybody else at the
24 table?

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Page 16

1 A. No.

2 Q. Was he unsteady on his feet?

3 A. No.

4 Q. Did he show any signs that were other than his
5 normal self when he went to the bathroom?

6 A. No.

7 Q. You testified to Mr. Farrah back in 2004 that
8 you left just before or just right around
9 11:00; is that correct?

10 MR. FARRAH: Objection.

11 A. Correct.

12 Q. Is that your memory as to what time you left,
13 as you sit here today?

14 A. Yes.

15 Q. It was not 10:00, correct?

16 MR. FARRAH: Objection.

17 A. No.

18 Q. Do you know whether or not any of the people at
19 the table that night ate just an appetizer or
20 an appetizer and a cup of soup as opposed to an
21 entree?

22 A. I don't know for certain.

23 Q. In fact, you can't quite remember what you had,
24 correct?

1 A. No.

2 Q. He was not any louder than you, correct?

3 A. No.

4 Q. You were not intoxicated, were you?

5 A. No.

6 Q. Seven guys in their early twenties, late teens
7 having dinner on a Friday night, correct?

8 A. Correct.

9 Q. Now, do you remember testifying that you were
10 at Four Points closer to forty minutes rather
11 than ten or fifteen minutes?

12 A. Yes.

13 Q. Now, you've testified various ways. What is
14 your memory as you sit here today? Do you
15 remember whether it was thirty-five minutes or
16 forty minutes or whatever minutes?

17 MR. FARRAH: Objection.

18 A. It was probably around half an hour.

19 Q. Okay. That's your best estimate as you sit
20 here today, correct?

21 A. Correct.

22 Q. Did you see Jeff Southworth go into the room
23 that you were standing outside of in the hotel?

24 A. No.

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Page 16

1 Q. He never went in the room?

2 A. Not that I know of.

3 Q. Did someone bring the beer out to him, or did
4 he go into the room to get it?

5 A. I'm pretty sure somebody brought it out.

6 Q. People in the room were bringing beers out to
7 people in the hallway?

8 MR. FARRAH: Objection.

9 A. I don't know whether the beer was brought from
10 the room the two people I didn't know were
11 staying in or the two bouncers or security that
12 we were talking to.

13 Q. Somebody was supplying beer to you people if
14 you wanted it at the hotel, correct?

15 A. Yes.

16 Q. And you were able to get it for the half hour
17 that you were there at the hotel if you wanted
18 it, correct?

19 A. Yes.

20 Q. And nobody was limiting anybody as to the
21 number of beers they had in the hotel, correct?

22 A. Correct.

23 Q. Nobody said, "Look, we only have enough for
24 everybody to have one," or "You're limited to

1 A. An estimate or a guesstimate.

2 Q. Is it fair to say that you were guessing at
3 that point?

4 MR. FARRAH: Objection.

5 A. I don't think I was guessing. I think I was
6 thinking that there was more a possibility that
7 he had had more.

8 Q. So when you said "maybe four," that's a
9 possibility, not an accurate statement as to
10 what you know him to have drunk at the table
11 that day, correct?

12 MR. FARRAH: Objection.

13 A. Yes.

14 Q. In fact, six weeks after the accident you told
15 the state police that he had maybe two,
16 correct?

17 MR. FARRAH: Objection.

18 A. Correct.

19 Q. Was it your understanding that you were at the
20 Longhorn close to two hours that evening?

21 MR. FARRAH: Objection.

22 A. Yes.

23 Q. Do you remember exactly how long you were at
24 the apartment complex that night before you

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Page 16

1 one beer," correct?

2 A. Yes.

3 Q. Do you know what type of beer it was?

4 A. I don't.

5 Q. Do you know how big the cooler was in the back
6 of Mr. Southworth's car?

7 A. No.

8 Q. Did you see the cooler?

9 A. No.

10 Q. Were you aware that he had a cooler in the back
11 seat?

12 A. No.

13 Q. You don't remember what the bartender looked
14 like, correct?

15 A. Not specifically.

16 Q. She didn't appear to be a friend of Scott's or
17 Jeff's, did she?

18 A. No.

19 Q. I know you were trying to answer the best you
20 could in the first deposition, but when you
21 answered "maybe" to these questions on page 38,
22 was that an accurate statement or was that a
23 guesstimate on your part?

24 MR. FARRAH: Objection.

1 left?

2 A. Not exactly.

3 Q. What is your best estimate?

4 MR. FARRAH: Objection.

5 A. At least twenty-five minutes, at the most
6 thirty-five minutes.

7 Q. How long did it take you to get from the
8 apartment complex to the scene of the accident?

9 A. Like close to ten minutes.

10 Q. The dogs were in the car for the whole time you
11 were in the restaurant?

12 A. Yes.

13 Q. They were sitting there for about two hours,
14 correct?

15 A. Yes.

16 Q. Did he let the dogs out of the car when you
17 went to the truck?

18 MR. FARRAH: Objection.

19 A. I don't remember.

20 Q. Did he rile the dogs up at any point when he
21 came out of the restaurant?

22 MR. FARRAH: Objection.

23 A. No.

24 MR. GILLIS: What is the nature of your

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Page 16

1 objection?

2 MR. FARRAH: "Riled the dogs up," form of

3 the question.

4 Q. You testified earlier that the one time you

5 thought he was intoxicated he riled up the dogs

6 at a party, correct?

7 MR. FARRAH: Objection.

8 A. Yes.

9 Q. He didn't exhibit any of that behavior when you

10 left the Longhorn on the night of September 26,

11 2003, did he?

12 A. No.

13 Q. When the police asked you, you didn't tell them

14 that you thought Mr. Southworth was intoxicated

15 that evening, did you?

16 A. No.

17 Q. When you were under testimony at the grand

18 jury, you never said that Mr. Southworth was

19 intoxicated that evening, did you?

20 A. No.

21 Q. In fact, when you left there that night, you

22 didn't believe him to be intoxicated, did you?

23 A. No.

24 Q. After you left the Longhorn that evening, you

1 A. I'm pretty sure that he had a beer at the

2 hotel.

3 Q. At the restaurant did they drink about the same

4 amount?

5 MR. FARRAH: Objection.

6 A. Correct.

7 Q. Did he show any signs of intoxication?

8 A. No.

9 Q. At any time at the restaurant do you remember

10 anybody at the table showing any signs of

11 intoxication?

12 A. No.

13 Q. After you left the restaurant and after there

14 was drinking at the hotel, did you see a change

15 in Mr. Southworth's demeanor after that point?

16 A. No.

17 Q. Did he seem intoxicated when he was getting in

18 his vehicle later on that evening?

19 A. No.

20 Q. Do you have any independent memory, not from

21 looking at documents today or anything else,

22 but your memory of the night of the accident?

23 Do you have a memory of there being any extra

24 drinks on the table?

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Page 16

1 first went to the hotel for a while, correct?

2 A. Yes.

3 Q. There was drinking in the hallway, correct?

4 A. Yes.

5 Q. Then you went to the strip bar, correct?

6 MR. FARRAH: Objection.

7 A. Yes.

8 Q. You left the strip bar without going into it

9 and went to the apartment complex, correct?

10 A. Correct.

11 Q. That was about a thirty-minute ride from the

12 Other Side to the apartment complex, correct?

13 MR. FARRAH: Objection.

14 A. Correct.

15 Q. Could it be a little less than that, do you

16 know?

17 MR. FARRAH: Objection.

18 A. If you were driving fast.

19 Q. Who was driving from the time you left the

20 Longhorn until the time that you arrived at the

21 apartment complex?

22 A. Scott.

23 Q. Did Scott have any more to drink that evening,

24 that you know of, than Mr. Southworth?

1 MR. FARRAH: Objection.

2 A. You mean just drinks that had been ordered and

3 not drinking?

4 Q. Yes.

5 A. No.

6 Q. When you say "checked out from the bar," did

7 you mean by that that you were just leaving the

8 bar to go to the table?

9 MR. FARRAH: Objection.

10 A. Yes.

11 Q. You didn't mean "cash out," correct?

12 MR. FARRAH: Objection.

13 A. No.

14 Q. If you had paid at the bar, you would have

15 said, "We paid the tab and went to the table,"

16 correct?

17 MR. FARRAH: Objection.

18 A. Yes.

19 Q. You answered several times today to questions

20 that you don't remember.

21 When you answer a question "I don't

22 remember" does that mean something didn't

23 happen or you just don't remember whether or

24 not it happened or didn't happen?

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1 MR. FARRAH: Objection.

2 A. I just don't remember whether it happened or

3 didn't happen.

4 Q. When you answered questions previously "I don't

5 remember," that is not to say whatever was

6 being talked about didn't happen. You just

7 don't remember whether it did or didn't,

8 correct?

9 MR. FARRAH: Objection.

10 A. Correct.

11 Q. Is it fair to say when the drinks came to the

12 table, they came one drink per person at a

13 time?

14 MR. FARRAH: Objection.

15 A. I think so but --

16 Q. I want your memory. Tell me your memory.

17 MR. FARRAH: Let him answer. He was

18 trying to.

19 A. I remember the round being ordered, but

20 according to the bill, there were seven drinks

21 brought to the table.

22 Q. That's why I'm asking for your memory. I know

23 what the bill says.

24 Your memory, as you sit here today, do you

Page 170

1 have a specific memory of seeing anybody with

2 more than one drink per round?

3 A. No.

4 Q. Did you see any of the managers walking around

5 there that night while you were at the

6 Longhorn?

7 A. I don't remember seeing any managers.

8 Q. Meaning you don't remember if they did or

9 didn't walk around?

10 A. Correct.

11 Q. Had you been to the Longhorn prior to this

12 date?

13 A. I had been there once before.

14 Q. How long prior to this accident was that?

15 A. It was probably a while, maybe a year before

16 then.

17 Q. Those are the only two times you have been to

18 the Longhorn?

19 A. Yes.

20 MR. GILLIS: I don't have any further

21 questions.

22

23

24

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1 REDIRECT EXAMINATION

2

3 BY MR. FARRAH:

4 Q. Is it accurate to say that as of September 26,

5 2003 Jeff was your friend?

6 A. Yes.

7 Q. And is it accurate to say that throughout this

8 process of speaking to different people about

9 the events of September 26, 2003 you have felt

10 uncomfortable about talking about Jeff, your

11 friend?

12 MR. GILLIS: Objection.

13 A. No.

14 Q. Is it accurate to say that you didn't want to

15 hurt Jeff as part of this process of speaking

16 to people about the events of September 26,

17 2003?

18 MR. GILLIS: Objection.

19 A. Well, not really because to be honest with you,

20 whatever happened that night and what will or

21 has happened, I think regardless of who it is,

22 they deserve whatever happens to them.

23 Q. Do you think Jeff deserves the punishment that

24 he got in the criminal case?

Page 17

1 A. I don't know exactly what he got.

2 Q. He was found guilty.

3 A. I know he was guilty. I don't know what his

4 sentencing was. I agree that he should serve

5 time.

6 Q. Do you think it was appropriate that Jeff be

7 found guilty of driving under the influence?

8 MR. GILLIS: Objection.

9 A. No. Well, what is driving under the influence?

10 Like having alcohol in your system and driving?

11 Then yes.

12 Q. Because he had alcohol in his system and he was

13 driving that night, wasn't he?

14 A. Yes.

15 Q. Throughout this process, have you tried to help

16 Jeff as best you can?

17 MR. GILLIS: Objection.

18 A. No.

19 MR. FARRAH: Okay. I'm done. Thank you.

20

21 RECROSS-EXAMINATION

22

23 BY MR. GILLIS:

24 Q. Have you spoken with Jeff since the accident?

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1 A. No.
 2 Q. So whatever friendship you had, you have not
 3 spoken with him in the last two-and-a-half
 4 years, correct?
 5 A. Correct.
 6 Q. Even if he were a closer friend than he was,
 7 you would not lie to the grand jury, would you?
 8 MR. FARRAH: Objection.
 9 A. No.
 10 Q. Would you lie at trial to benefit Jeff?
 11 MR. FARRAH: Objection.
 12 A. No.
 13 Q. Would you lie under oath at your deposition?
 14 A. No.
 15 Q. Would you lie on your affidavit to benefit
 16 Jeff?
 17 A. No.
 18 Q. By the way, the affidavit, Paragraph 6, that
 19 Mr. Farrah talked about states that you
 20 testified at your deposition to certain things,
 21 correct?
 22 A. Correct.
 23 Q. We have gone through a lot of those things to
 24 specify them, correct?

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1 A. Correct.
 2 Q. It says here, "Everyone at the table was loud."
 3 As you've testified, Mr. Southworth was not any
 4 more particularly loud than anybody else,
 5 correct?
 6 A. Correct.
 7 Q. You can't remember whether it was a waitress or
 8 a manager who came over to you, correct?
 9 A. Correct.
 10 Q. That was twenty to twenty-five minutes before
 11 you left the restaurant, correct?
 12 MR. FARRAH: Objection.
 13 A. Yes.
 14 Q. Prior to that time nobody that you're aware of
 15 complained of any of the behavior at the table,
 16 correct?
 17 MR. FARRAH: Objection.
 18 A. Correct.
 19 Q. Nobody had to come to the table and tell you
 20 guys to be knock something off or quiet down,
 21 correct?
 22 A. Yes.
 23 Q. When you said in your deposition you testified
 24 to certain things on 49 to 51. You didn't see

Page 17

1 any change in his demeanor that night while he
 2 was at the Longhorn that would indicate to you
 3 that he was under the influence, correct?
 4 MR. FARRAH: Objection.
 5 A. No.
 6 Q. So in fact, in your opinion as you stated today
 7 under oath, he was not under the influence of
 8 alcohol that you could tell when he was at the
 9 Longhorn that evening, correct?
 10 MR. FARRAH: Objection.
 11 A. I guess. Referring to the last question, what
 12 exactly is "under the influence"?
 13 Q. Let's go back to this. When you signed this
 14 document that Mr. Farrah prepared for you where
 15 he wrote on your behalf that Mr. Southworth
 16 seemed to be under the influence of alcohol,
 17 what did you think "under the influence of
 18 alcohol" meant?
 19 MR. FARRAH: Objection.
 20 A. I can say that I don't think he was drunk. I
 21 mean, he was under the influence in respect
 22 that he had been drinking alcohol.
 23 Q. So when you agreed to sign for Mr. Farrah this
 24 statement, your understanding of what

Page 17

1 Mr. Farrah wrote for you was being under the
 2 influence of alcohol was the fact that you had
 3 alcohol in your system, correct?
 4 MR. FARRAH: Objection.
 5 A. Correct.
 6 Q. It didn't mean that he was drunk, correct?
 7 MR. FARRAH: Objection.
 8 A. Yes.
 9 Q. And, in fact, while at the Longhorn, no slurred
 10 speech, correct?
 11 A. Correct.
 12 Q. He was steady on his feet going to the
 13 bathroom, correct?
 14 A. Correct.
 15 Q. No slurring at the table, correct?
 16 A. Correct.
 17 Q. No louder than anyone else at the table,
 18 correct?
 19 A. Correct.
 20 Q. You don't have a specific memory of any glassy
 21 eyes, correct?
 22 MR. FARRAH: Objection.
 23 A. Correct.
 24 MR. GILLIS: I have no further questions.

18 Barbara J. Simon, Notary Public
19 My Commission Expires:
November 6, 2009

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SIGNATURE PAGE/ERRATA SHEET

RE: Nancy Rosario, Individually, as she is the Administratrix of the Estate of Awilda Santiago, Essex Probate Court Docket #03P-2499AD1, P/P/a Veronica Rosario and Christina Santiago, and as she is the Administratrix of the Estate of Jose Santiago, Berlin (Connecticut) Probate Court, Case #03-0713 v. Rare Hospitality International, Inc. d/b/a Longhorn Steakhouse

February 10, 2006
Deposition of Jude Connelly

I, JUDE CONNELLY, do hereby certify that I have read the foregoing transcript of my testimony and further certify that it is a true and accurate record of my testimony (with the exception of the following changes listed below):

Page	Line	Correction
------	------	------------

[illegible]

Signed under the pains and penalties of
perjury this _____ day of _____
_____, 2006.

Jude Connelly

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Volume:
Pages: 1 - 76
Exhibits: 1 - 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action #05-CV-10617MLW

NANCY ROSARIO, INDIVIDUALLY,
AS SHE IS THE ADMINISTRATRIX
OF THE ESTATE OF AWILDA SANTIAGO,
ESSEX PROBATE COURT DOCKET #03P-2499AD1,
P/P/A VERONICA ROSARIO AND
CHRISTINA SANTIAGO, AND AS SHE IS
THE ADMINISTRATRIX OF THE ESTATE
OF JOSE SANTIAGO, BERLIN (CONNECTICUT)
PROBATE COURT, CASE #03-0713,

Plaintiff

vs.

RARE HOSPITALITY INTERNATIONAL, INC., d/b/a
LONGHORN STEAKHOUSE,

Defendant

Deposition of MICHAEL ESPEY, a witness
called on behalf of the Plaintiff, pursuant
to the Federal Rules of Civil Procedure,
before Rosamond K. Marcy, a Certified
Shorthand/Registered Professional Reporter
and Notary Public in and for the Commonwealth
of Massachusetts, at the Offices of Albert L.
Farrah, Jr., Esquire, One Washington Mall,
Boston, Massachusetts 02108, commencing at
10:00 A.M. on Tuesday, April 25, 2006.

Page 2

APPEARANCES:

ALBERT L. FARRAH, JR., ESQUIRE
One Washington Mall
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1150 Walnut Street
Newton, Massachusetts 02461
for the Defendant.

I N D E X

Deposition of: DIRECT CROSS REDIRECT RECROSS

MICHAEL ESPEY

(By Mr. Farrah) 4 72
73

(By Mr. Gillis) 39 73

E X H I B I T S

Michael Espey
Number: For Ident.

1 - Handwritten document by
Mike Espey 37

2 - Document entitled Longhorn
Steakhouse 45

Page 4

STIPULATIONS

It is hereby stipulated and
agreed by and between counsel for the
respective parties that the witness will
read and sign the deposition transcript
within thirty days. The sealing and
filing of the deposition transcript are
waived.

It is further stipulated and
agreed that all objections, except as to
form, and motions to strike will be
reserved to the time of trial.

MICHAEL ESPEY,
a witness called on behalf of the
Plaintiff, having first been properly
identified and duly sworn, deposes and
says as follows:

DIRECT EXAMINATION

BY MR. FARRAH

Q. Good morning. As you know my name is
Albert Farrah and I represent the
plaintiff Nancy Rosario in this lawsuit.
We have agreed that you will have thirty
days from the date of your receipt of

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Page

1 the transcript of your testimony to
2 indicate on a separate sheet of paper
3 any changes you feel should be made in
4 that transcript and if you choose to do
5 so within that thirty-day period you
6 need to return the separate sheet of
7 paper with the changes to me. Do you
8 understand that?

9 A. Yes.

10 Q. Tell me your full name.

11 A. Michael Joseph Espey.

12 Q. Where do you live, sir?

13 A. 80 Old Mill Road in Harvard,
14 Massachusetts.

15 Q. What is your date of birth?

16 A. August 31, 1979.

17 Q. What is your Social Security number?

18 A. 033-68-8318.

19 Q. Are you currently employed?

20 A. Yes, sir.

21 Q. Where are you employed?

22 A. Foreign Motors West Mercedes Benz.

23 Q. What do you do there?

24 A. Sales.

1 A. I'm going to say approximately twenty.

2 MR. GILLIS: If you know

3 answer the question. Don't guess.

4 THE WITNESS: I wouldn't

5 know an exact number of times but it was
6 not a very large amount.

7 Q. Your best estimate is about twenty
8 times?

9 A. Yes.

10 Q. Do you understand that your deposition
11 is being taken in connection with an
12 automobile accident that occurred in the
13 early morning hours of September 27,
14 2003?

15 A. Yes, I do.

16 Q. In connection with that accident has
17 anyone who you understood to be a
18 private investigator ever spoken to you?

19 A. I have had somebody contact me, yes.

20 Q. On how many occasions has the private
21 investigator contacted you?

22 A. Once or twice.

23 Q. Do you know how close in time it was to
24 the accident of September 27, 2003 that

Page 6

Page 6

1 Q. How long have you been employed there?

2 A. A month.

3 Q. Can you briefly describe your
4 educational background for us.

5 A. I graduated high school in 1997. I went
6 to college for several years. I did not
7 graduate.

8 Q. Do you know Jeffrey Southworth?

9 A. Yes.

10 Q. Can you tell me approximately when you
11 first met Mr. Southworth?

12 A. I approximately met Mr. Southworth
13 sometime during the beginning of high
14 school, maybe younger than that.

15 Q. Did you live in the same town?

16 A. Yes.

17 Q. And were you in Mr. Southworth's
18 presence on September 26, 2003?

19 A. Yes.

20 Q. In between those two times, that is when
21 you first met him and when you were with
22 him on September 26, 2003, can you
23 quantify for me how many times you were
24 in Mr. Southworth's presence?

1 that private investigator contacted you?

2 A. I would guess it was a couple of months
3 afterwards but I can't remember exactly
4 the date.

5 Q. If you say guess, you will incur the
6 wrath of Mr. Gillis.

7 A. I don't know.

8 Q. Your best estimate is a few months
9 afterwards, is that right?

10 A. Yes.

11 Q. Do you know who that private
12 investigator was, that is, his or her
13 name?

14 A. No, I don't remember.

15 Q. Do you know for whom the private
16 investigator was working?

17 A. I thought it was for Mr. Southworth.

18 Q. Did you give that private investigator a
19 statement?

20 A. I don't believe so.

21 Q. Since that time has any other private
22 investigator been in contact with you?

23 A. I don't believe so.

24 Q. Has anyone from the Dinatale Detective

Page 9

Page 1

1 Agency been in contact with you?

2 A. Not that I know of.

3 Q. Prior to September 26, 2003 had you ever
4 seen Jeffrey Southworth in what you
5 believe to be a condition of
6 intoxication?

7 A. Yes.

8 Q. On approximately how many occasions
9 prior to that date did you see him in
10 such a state?

11 A. Maybe four or five.

12 Q. Were there any particular manifestations
13 of that intoxication that led you to
14 believe he was intoxicated?

15 A. Just being around a bunch of other
16 people that were intoxicated I would
17 say.

18 Q. Was loudness one of the characteristics
19 that he exhibited when he was
20 intoxicated?

21 MR. GILLIS: Objection. I
22 have to object for the record but if you
23 can answer the question go ahead and
24 answer it.

1 A. I don't think so.

2 Q. Were you at the Longhorn Steakhouse in
3 Leominster, Massachusetts with a party
4 that included Jeffrey Southworth on
5 September 26, 2003?

6 A. Yes.

7 Q. And do you know approximately what time
8 you arrived at the Longhorn Steakhouse?

9 A. Without guessing, no.

10 Q. Do you know what you had been doing that
11 day prior to arriving at the Longhorn
12 Steakhouse?

13 A. Yes.

14 Q. What had you been doing that day?

15 A. I had seen some friends from Vermont
16 that I hadn't seen in a long time.

17 Q. When did you first meet up with them?

18 A. I'd say probably sometime early
19 afternoon.

20 Q. Where did you meet up with them?

21 A. In Leominster at a hotel right by BJ's,
22 Four Points.

23 Q. Was it in a room at the Four Points that
24 you met up with these friends?

Page 10

Page 1

1 A. Yes, sure.

2 Q. Did he in the past exhibit loud speech
3 as one of the characteristics of
4 intoxication that you observed?

5 MR. GILLIS: Objection.

6 A. Yes.

7 Q. Your brother's name is Thomas Scott
8 Espey?

9 A. Yes.

10 Q. He is known as Scott, is that right?

11 A. That's correct.

12 Q. To your knowledge was Scott spending
13 time in the presence of Jeffrey
14 Southworth during the spring and summer
15 of 2003?

16 A. I believe so, yes.

17 Q. Did you ever have any discussions with
18 Scott during that period about Jeffrey
19 Southworth?

20 A. Yes.

21 Q. Did you ever have discussions with him
22 around whether or not in your opinion it
23 was a good idea for him to spend time
24 with Jeffrey Southworth?

1 A. Yes.

2 Q. What are their names?

3 A. Bruce Sirjane and Matthew Cenicola.

4 Q. During the time that you were with Matt
5 and Bruce at the hotel did you
6 personally have any alcoholic beverages
7 to drink?

8 A. Yes, I did.

9 Q. Can you tell me what alcoholic beverages
10 you had to drink while you were at the
11 hotel with them?

12 A. I would say probably some beers and
13 probably some Jack Daniels but I don't
14 know for sure. I'm guessing.

15 Q. What is your best memory of what you had
16 to drink?

17 A. Beers and Jack Daniels.

18 Q. Can you quantify for me how many beers
19 you had at the hotel before you went to
20 the restaurant?

21 A. I would have no idea.

22 Q. Can you tell me when you started
23 drinking those beers?

24 A. Probably mid afternoon.

Page 13

1 Q. Three o'clock?
2 A. Sure.
3 Q. Was Bruce drinking that afternoon with
4 you as well?
5 A. I believe so.
6 Q. Is there any doubt in your mind about
7 whether or not Bruce was drinking with
8 you that afternoon?
9 A. There's a lot of doubt in my mind about
10 the whole day.
11 Q. And that's because you were drunk.
12 MR. GILLIS: Objection.
13 A. Yes.
14 Q. My question to you is do you know
15 whether or not Bruce had anything to
16 drink while you and he were together at
17 the hotel?
18 A. I would say yes.
19 Q. Do you know what he was drinking?
20 A. I would say beers.
21 Q. Was he drinking Jack Daniels as well?
22 A. Possibly but I don't know for sure.
23 Q. Who brought the Jack Daniels to the
24 room?

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1 A. I would say one of the two of them
2 brought it with them.
3 Q. You did not bring it as far as you know.
4 A. As far as I know.
5 Q. Who brought the beers to the room?
6 A. I would say probably the two of them as
7 well.
8 Q. You didn't supply any of the alcoholic
9 beverages that day.
10 A. No.
11 Q. Was Matt drinking alcoholic beverages
12 that afternoon with Bruce and you?
13 A. Yes.
14 Q. Do you know what Matt was drinking that
15 afternoon?
16 A. Beers and Jack Daniels.
17 Q. At any point in time that afternoon did
18 you say to Matt or to Bruce in effect,
19 "I'm drunk"?
20 A. No.
21 Q. Do you remember having any discussion
22 with Matt or Bruce that afternoon about
23 your level of intoxication?
24 A. No.

Page 1

1 Q. Do you remember having any discussion
2 that afternoon about Matt's level of
3 intoxication?
4 A. No.
5 Q. Do you remember having any discussion
6 that afternoon about Bruce's level of
7 intoxication?
8 A. No.
9 Q. Was there any point in time from when
10 you started drinking that afternoon at
11 the hotel until you left the hotel that
12 you were not drinking alcoholic
13 beverages?
14 MR. GILLIS: Objection.
15 A. I would say I wasn't drinking every
16 second of the afternoon. I don't know
17 how to answer it. I would say no.
18 Q. Do you have a memory of at any point in
19 time during that afternoon while you
20 were at the hotel of consciously
21 stopping drinking alcoholic beverages?
22 A. No.
23 Q. Do you have a memory at any point in
24 that afternoon while you were at the

Page 1

1 hotel of Matt consciously stopping
2 drinking alcoholic beverages?
3 A. No.
4 Q. Do you have any memory of any point in
5 time in that afternoon of Bruce
6 consciously stopping drinking alcoholic
7 beverages?
8 A. No.
9 Q. Did you go from the hotel to the
10 Longhorn Steakhouse directly?
11 A. Yes.
12 Q. Do you have an opinion as of the time
13 you left the hotel whether or not Matt
14 was under the influence of alcoholic
15 beverages?
16 A. I would say he was.
17 Q. Do you have an opinion as of the time
18 you left the hotel whether or not Bruce
19 was under the influence of alcoholic
20 beverages?
21 A. I would say he was.
22 Q. Do you have an opinion as of the time
23 you left the hotel whether or not Matt
24 was intoxicated?

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Page 1

1 A. I wouldn't have an opinion either way,
2 no.
3 Q. How about Bruce?
4 A. I wouldn't have an opinion either way.
5 Q. Can you tell me approximately how many
6 beers per hour you drank while you were
7 at the hotel and if it's less than one
8 beer per hour use a fraction.
9 A. I would say one to two.
10 Q. Can you tell me approximately how many
11 Jack Daniels drinks you had per hour,
12 and again if it's less than one use a
13 fraction, while you were at the hotel?
14 MR. GILLIS: Objection.
15 A. I had put the two together in the other
16 question so probably one and one, one
17 beer per hour and one Jack Daniels per
18 hour.
19 Q. And that was from mid afternoon until
20 you left the hotel, is that right?
21 A. Yes.
22 Q. How were you drinking the Jack Daniels?
23 A. Mixing it with Coke, I believe.
24 MR. GILLIS: Objection.

1 and you, to the hotel?
2 A. I believe my house.
3 Q. So he had picked you up by
4 pre-arrangement that day, is that right?
5 A. Yes.
6 Q. What was your plan when you left your
7 house that day, if you had one,
8 Mr. Currie and you?
9 A. To go see two friends I hadn't seen in a
10 while and go to dinner with them later
11 on.
12 Q. Was Mr. Currie with Bruce and you, that
13 is, in your presence throughout the
14 afternoon at the hotel?
15 A. Yes.
16 Q. And is it your best memory that
17 Mr. Currie had no alcoholic beverages to
18 drink at that time?
19 A. I wouldn't say zero but I don't think he
20 had more than one or two.
21 Q. As opposed to the rest of you.
22 A. Yes.
23 Q. The one or two alcoholic beverages that
24 Mr. Currie had during this time were

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Page 2

1 Q. How was Bruce drinking the Jack Daniels?
2 A. The same way, again with Coke.
3 Q. How was Matt drinking them?
4 A. Probably the same way with Coke.
5 Q. Do you know how, that is by way of mode
6 of transport, you went from the Four
7 Points to the Longhorn that night?
8 A. I believe by car.
9 Q. Do you know whose car?
10 A. I think we took Bruce's truck and
11 William Todd Currie drove.
12 Q. Was Mr. Currie somebody who was drinking
13 with you that afternoon at the hotel?
14 A. I don't believe so, no.
15 Q. When did you come into the presence of
16 Mr. Currie that day?
17 A. I went with him to the hotel.
18 Q. You went with him to the hotel?
19 A. Yup.
20 Q. How did you get to the hotel?
21 A. In his car.
22 Q. What kind of car does he drive?
23 A. A BMW.
24 Q. Where had you driven from, Mr. Currie

1 what?
2 A. Beer, I would think.
3 Q. Was that Mr. Currie's drink of choice?
4 A. Drink of choice? There are so many to
5 choose from.
6 Q. Did he have a favorite?
7 A. I know now what his favorite is. I
8 didn't know what his favorite was at the
9 time.
10 Q. What is his favorite now?
11 A. Vodka and grape juice.
12 Q. Do you know why Mr. Currie drove Bruce's
13 truck from Four Points to the Longhorn?
14 A. More space. There were four people.
15 Q. Why didn't Bruce drive his truck?
16 A. I would think because he had a couple of
17 more drinks.
18 Q. When you say a couple more drinks, do
19 you mean he had been drinking along the
20 order of what you testified to already?
21 MR. GILLIS: Objection.
22 A. Yes.
23 Q. Do you remember any conversation among
24 any of the four of you prior to the time

Page 21

Page 2

1 that Mr. Currie began to drive the truck
 2 over to the Longhorn about whether or
 3 not Bruce should drive?
 4 A. I do not remember a conversation about
 5 that.
 6 Q. Do you remember any conversation among
 7 the four of you during the drive from
 8 the hotel to the restaurant about
 9 whether or not Bruce was capable of
 10 driving?
 11 A. No.
 12 Q. Can you tell me what time you got to the
 13 restaurant?
 14 A. My best approximation is eight o'clock.
 15 Q. Was it dark when you got to the
 16 restaurant?
 17 A. It wasn't dark, it was dusk.
 18 Q. When you got to the restaurant how much
 19 time elapsed from when you got to the
 20 restaurant until you were seated at a
 21 table?
 22 A. I have no idea.
 23 Q. Do you know whether prior to being
 24 seated at the table at the restaurant

1 A. No.
 2 Q. Is there any question in your mind about
 3 whether or not from the moment you
 4 arrived at the Longhorn Steakhouse until
 5 you left you were drunk?
 6 MR. GILLIS: Objection.
 7 A. No.
 8 Q. Were you drunk from the moment you
 9 arrived at the Longhorn Steakhouse until
 10 you left?
 11 MR. GILLIS: Objection.
 12 A. Yes.
 13 Q. You don't remember whether you went to
 14 the bar or not before you were seated at
 15 a table, is that right?
 16 A. I do not.
 17 Q. At some point in time were you seated at
 18 a table with Jeffrey Southworth?
 19 A. I believe so. Yes.
 20 MR. GILLIS: Don't guess if
 21 you don't know.
 22 Q. Is there any doubt in your mind about
 23 whether you were seated at a table with
 24 Mr. Southworth?

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1 you went to the bar?
 2 A. I do not know. I have no idea.
 3 Q. You have no memory?
 4 A. No.
 5 Q. Is that because in your own view you
 6 were drunk that night?
 7 MR. GILLIS: Objection.
 8 A. Yes.
 9 Q. You already testified in your earlier
 10 deposition that you were drunk that
 11 night, is that right?
 12 MR. GILLIS: Objection.
 13 A. Yes.
 14 Q. There's no question in your mind that
 15 while you were a customer at the
 16 Longhorn Steakhouse you were drunk that
 17 night, isn't that night?
 18 MR. GILLIS: Objection.
 19 A. Yes.
 20 Q. Is there any question in your mind about
 21 whether or not while you were a customer
 22 at the Longhorn Steakhouse you were
 23 drunk?
 24 MR. GILLIS: Objection.

1 A. No.
 2 Q. Do you know what you had to drink, if
 3 anything, while you were a customer at
 4 the Longhorn Steakhouse that night?
 5 A. I know I did have drinks. I believe I
 6 was drinking any combination of beers,
 7 Jack Daniels, and Manhattans.
 8 Q. Do you know whether or not you had any
 9 beers at the Longhorn Steakhouse that
 10 night?
 11 A. With any absolute certainty I do not
 12 know what I had to drink that night.
 13 Q. Do you believe you had beers while you
 14 were at the Longhorn Steakhouse that
 15 night?
 16 A. Yes.
 17 Q. Can you tell me how many beers you
 18 believe you had at the Longhorn
 19 Steakhouse that night?
 20 MR. GILLIS: Objection.
 21 A. Approximately one to three.
 22 Q. Can you tell me whether or not you
 23 believe those beers to be 12-ounce size
 24 or different from 12-ounce size?

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1 A. I have no idea.
 2 Q. Do you believe you had Jack Daniels
 3 Manhattans at the Longhorn that night?
 4 MR. GILLIS: Objection.
 5 A. I believe I did.
 6 Q. Did you have Jack Daniels Manhattans at
 7 the Longhorn that night?
 8 MR. GILLIS: Objection.
 9 A. I believe so.
 10 Q. And can you tell me how many Jack
 11 Daniels Manhattans you believe you had
 12 at the Longhorn Steakhouse that night?
 13 A. I have no idea.
 14 Q. What's your best judgment of the number
 15 of Jack Daniels Manhattans you had at
 16 the Longhorn that night?
 17 MR. GILLIS: Objection.
 18 A. One to three.
 19 Q. The Jack Daniels Manhattans that you
 20 believe you had at the Longhorn that
 21 night were they straight up or on the
 22 rocks?
 23 A. I have no idea.
 24 Q. Do you know the difference in what I

1 the question. Do you have any memory as
 2 to what he was drinking that night?
 3 MR. GILLIS: Objection.
 4 A. No, I do not.
 5 Q. Do you know what any of the other
 6 persons at your table were drinking that
 7 night?
 8 A. I am sure there were beers and I'm sure
 9 there were Manhattans.
 10 Q. Tell me who else you are sure was
 11 drinking beers that night at your table.
 12 MR. GILLIS: Objection.
 13 A. Everybody but Jude.
 14 Q. Tell me who at your table was drinking
 15 Jack Daniels Manhattans that night.
 16 A. I have no idea.
 17 Q. Was Jeffrey Southworth exhibiting what
 18 you took to be signs of intoxication at
 19 any point in time that evening?
 20 A. Yes. Let me just describe when I'm
 21 intoxicated a lot of people around you
 22 appear to be intoxicated and you think
 23 if somebody's smiling they're drunk. I
 24 would say yes.

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1 mean by straight up versus on the rocks?
 2 A. Yes.
 3 Q. Had you ever been at a restaurant with
 4 Jeffrey Southworth at which he was
 5 having Jack Daniels Manhattans prior to
 6 September 26, 2003?
 7 A. Yes.
 8 Q. Do you recall how, that is on the rocks
 9 or straight up, he was drinking Jack
 10 Daniels Manhattans?
 11 A. I don't remember. I don't recall.
 12 Q. Do you know what Jeffrey Southworth had
 13 to drink that night?
 14 A. No idea.
 15 Q. Do you have any belief, based on your
 16 observations of him that night as to
 17 what he had to drink that night?
 18 MR. GILLIS: Objection.
 19 A. I could only guess.
 20 Q. Even I am going to join with Mr. Gillis
 21 in saying that we don't want you to only
 22 guess. If you have any memory at all of
 23 what Mr. Southworth was drinking that
 24 night I would like you to try to answer

1 Q. Can you tell me what signs of
 2 intoxication he exhibited to you that
 3 evening?
 4 MR. GILLIS: Objection.
 5 A. No. I would say maybe loud.
 6 Q. Can you tell me at what point in time in
 7 the evening he first began to exhibit to
 8 you what you interpreted to be signs of
 9 intoxication?
 10 A. No, I can't.
 11 Q. Can you tell me whether or not there was
 12 any point in time while you were at the
 13 Longhorn that evening when
 14 Mr. Southworth was not exhibiting to you
 15 what you took to be signs of
 16 intoxication?
 17 MR. GILLIS: Objection.
 18 A. You kind of twisted that question on me.
 19 Can you repeat that one?
 20 MR. FARRAH: Will you repeat
 21 the question I just asked.
 22 [Question read.]
 23 MR. GILLIS: He has already
 24 said he exhibited no signs that he can

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1 say.

2 MR. FARRAH: That's not
3 true.

4 MR. GILLIS: That's exactly
5 what he said.

6 MR. FARRAH: Let him answer
7 the question.

8 MR. GILLIS: If you can
9 answer that question in its double
10 negative form go ahead.

11 MR. FARRAH: This is not
12 your witness. You are not instructing
13 him.

14 MR. GILLIS: He instructed
15 you he doesn't understand your question.

16 THE WITNESS: I can't answer
17 that question.

18 Q. Do you know at what point in time
19 Mr. Southworth first appeared to you to
20 be intoxicated that evening at the
21 Longhorn?

22 MR. GILLIS: Objection.

23 A. No, I don't know at what point.

24 MR. GILLIS: He testified he

1 of the Longhorn came to your table and
2 asked your table to quiet down or words
3 to that effect?

4 A. I do not believe so.

5 Q. After leaving the Longhorn where did you
6 go that evening?

7 A. To the Other Side, to a strip club.

8 Q. Prior to going to the Other Side did you
9 return to the hotel?

10 A. I don't know whether we went back to the
11 hotel.

12 Q. Did you drive from the Longhorn to
13 wherever you went next?

14 A. I did not drive anywhere.

15 Q. Do you know who drove when you left the
16 Longhorn to wherever you went next that
17 evening?

18 A. Todd.

19 Q. What did he drive?

20 A. Bruce's truck.

21 Q. Who was with you when you left the
22 Longhorn in Bruce's truck with Todd
23 driving that evening?

24 A. Todd, myself, Bruce, and Matt.

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1 was intoxicated at the Longhorn. You
2 are asking really sneaky sleazy
3 questions. If you want to ask him a
4 straight question go ahead.

5 [Discussion off the record.]

6 Q. When did Mr. Southworth first exhibit
7 what you took to be signs of
8 intoxication that evening?

9 A. I don't know exactly when.

10 Q. Was it before you left the restaurant
11 that he first exhibited signs of
12 intoxication that evening?

13 MR. GILLIS: Objection.

14 A. Yes. The only time I saw him was pretty
15 much at the restaurant.

16 Q. Can you tell me how long before you left
17 the restaurant it was that he first
18 exhibited what you took to be signs of
19 intoxication that evening?

20 A. I don't have a good sense of time from
21 that evening.

22 Q. Do you have a recollection of whether or
23 not at any point in time that evening
24 anyone you understood to be an employee

1 Q. Did you eat while you were at the
2 Longhorn?

3 A. Yes.

4 Q. Do you know what you ate?

5 A. I do not know.

6 Q. Do you know where you spent the night?

7 A. At the hotel.

8 Q. Are you sure?

9 A. No.

10 Q. Do you know what you did the next day?

11 A. I was at a concert with Bruce and Matt.

12 Q. Did you go to the Other Side that you
13 answered a little earlier was a
14 destination that evening?

15 A. Yes.

16 Q. Did you go in?

17 A. Yes.

18 Q. Who went in with you?

19 A. Bruce, Matt, and Todd.

20 Q. Do you know how long you were there?

21 A. I don't.

22 Q. Were you drinking there?

23 A. I believe so.

24 Q. Do you know how you got from the Other

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1 Side club to wherever you went next?
2 A. The same way we got to the hotel. It
3 was Bruce's truck.
4 Q. Do you know where you went next in
5 location after leaving the Other Side?
6 A. Back to the hotel.
7 Q. And is your best memory that's where you
8 spent the night.
9 A. I don't honestly know where I spent the
10 night. I think I might have actually
11 gone home because I had to get my car to
12 go to the concert the next day.
13 Q. Do you know how you got home?
14 A. Yes. I got home with Todd.
15 Q. Was Todd drinking at the Other Side?
16 A. I do not know.
17 Q. Was Todd drinking at the Longhorn?
18 A. I don't know. He might have had a beer
19 but I can't swear on the record that
20 yes, he had a beer.
21 Q. Is Todd someone in your experience who
22 is more moderate in his drinking habits
23 than, say, you?
24 MR. GILLIS: Objection.

1 A. No.
2 Q. Did you testify in the criminal case
3 against Mr. Southworth?
4 A. In the case in court?
5 Q. Yes, sir.
6 A. No.
7 Q. Have you testified anywhere except in an
8 earlier deposition that I and some
9 different lawyers conducted?
10 A. No.
11 Q. Have you spoken to anyone about the
12 events of that evening?
13 A. Yes.
14 Q. Have you discussed with anyone other
15 than in the deposition that I took
16 whether or not Jeffrey Southworth was
17 intoxicated while a customer at the
18 Longhorn?
19 A. I talked to my brother about it.
20 Q. When did you have a conversation with
21 your brother about it?
22 A. The next morning.
23 Q. Tell me what you remember he said and
24 you said in that conversation.

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1 A. Not always.
2 Q. Was Todd a designated driver of sorts
3 that day?
4 MR. GILLIS: Objection.
5 A. Yes.
6 Q. Was that the arrangement that you had
7 made with Todd?
8 A. Kind of tricked him into it.
9 Q. He became the de facto designated driver
10 as the day unfolded?
11 A. Yes.
12 Q. Did you have any discussions with him
13 about that?
14 A. No.
15 Q. In your way of thinking was Todd sober
16 enough to drive from the Four Points to
17 the Longhorn?
18 A. I believe so.
19 Q. To your way of thinking was he sober
20 enough to drive from the Longhorn to
21 wherever you went next?
22 A. I believe so.
23 Q. Have you testified before the Grand Jury
24 in this matter?

1 A. I remember the conversation being along
2 the line of what happened and trying to
3 put together the pieces. I remember my
4 brother's foot was run over. Did I have
5 a conversation with him the next
6 morning? He was in the hospital the
7 next morning. I know I talked to my
8 brother about what happened. I know his
9 foot was broken. I don't know how his
10 foot was broken. Jeff ran over his
11 foot.
12 Q. My question to you is did you have
13 conversations with anyone about whether
14 or not Jeff Southworth was under the
15 influence of intoxicating beverages
16 while he was a customer at the Longhorn
17 that evening?
18 A. No.
19 Q. Do you remember discussing with anyone
20 whether or not Jeff was drunk that
21 evening?
22 A. No.
23 Q. I'm going to show you a document and ask
24 you if that is your signature at the

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1 bottom.
 2 A. Yes.
 3 Q. Is that your handwriting as well?
 4 A. Yes, it is.
 5 [Handwritten document by
 6 Mike Espey marked Michael
 7 Espey Exhibit No. 1 for
 8 Identification.]
 9 Q. Do you remember the circumstances under
 10 which you wrote and then signed this
 11 document, Exhibit 1?
 12 A. I believe there was some kind of a
 13 police officer that came and asked for a
 14 statement.
 15 Q. Can you tell me how close in time it was
 16 that he came and asked for a statement
 17 to the evening of September 26, 2003?
 18 A. Not with any certainty.
 19 Q. Do you know where you made this
 20 statement?
 21 A. At my house.
 22 Q. The third line down reads, "While at the
 23 Longhorn we received a call from my
 24 brother," is that right?

1 A. I don't know.
 2 Q. Do you know what it was back in
 3 September of 2003?
 4 A. No.
 5 Q. What is it today?
 6 A. 978-407-3115.
 7 Q. You see that this document that has been
 8 marked as Exhibit 1 in your deposition
 9 has a photocopy of a sticker that says
 10 Grand Jury Exhibit 19 at the bottom.
 11 See that?
 12 A. Yes.
 13 Q. Do you have a memory of actually
 14 physically appearing before the Grand
 15 Jury?
 16 A. No.
 17 CROSS-EXAMINATION
 18 BY MR. GILLIS
 19 Q. My name is Michael Gillis. I represent
 20 Longhorn Steakhouse and I want to ask
 21 you some questions about the night of
 22 September 26, 2003. You have been shown
 23 a document in front of you that is
 24 marked Exhibit 1, correct?

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1 A. Yes.
 2 Q. This is your brother Scott?
 3 A. Yes.
 4 Q. Do you know where Scott was when you
 5 received that call?
 6 A. On his way back from riding dirt bikes.
 7 Q. Was it you that Scott called?
 8 MR. GILLIS: Objection.
 9 A. I believe so.
 10 Q. What's your cell phone number?
 11 A. Then or now? I don't know what it was
 12 then. It's different now.
 13 Q. What is it now?
 14 A. It's 978-424-5827.
 15 Q. Who is your carrier?
 16 A. Cingular.
 17 Q. Back in 2003 who was your carrier?
 18 A. Verizon, if I had a cell phone then.
 19 Q. Can you tell me what other carriers than
 20 Verizon and Cingular you have had cell
 21 phone service with?
 22 A. That is every one.
 23 Q. What is your brother's cell phone
 24 number?

1 A. Yes.
 2 Q. When you look at that that's a statement
 3 you gave to the State Police, correct?
 4 A. Correct.
 5 Q. What was the date of that statement?
 6 A. I do not know the exact date.
 7 Q. It was submitted to the Grand Jury on
 8 November 5, '03, correct?
 9 A. Correct.
 10 Q. That was two months after the accident,
 11 correct?
 12 A. Correct.
 13 Q. And at that time you had told the State
 14 Police that you had gone back to the
 15 Four Points Hotel for about forty-five
 16 minutes, correct?
 17 MR. FARRAH: Objection.
 18 A. The document says thirty to forty-five
 19 minutes.
 20 Q. You went back thirty to forty-five
 21 minutes, is that correct?
 22 A. According to the document, yes.
 23 Q. That was your best memory at the time,
 24 is that correct?

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1 A. Yes. Probably more accurate than my
2 memory now.
3 Q. So if your memory today differs from
4 back then it's not because of any
5 intoxication today, correct?
6 A. No.
7 Q. It's just because of the passage of
8 time, is that correct?
9 A. Correct.
10 Q. When you said that you couldn't remember
11 a lot of things in answer to
12 Mr. Farrah's questions is that because
13 of the passage of time as well?
14 MR. FARRAH: Objection.
15 A. As well as the intoxication?
16 Q. Yes.
17 A. Yes.
18 Q. It could be, correct?
19 MR. FARRAH: Objection.
20 A. Yes.
21 Q. Specifically what time did you arrive at
22 the Four Points Hotel that afternoon?
23 A. Sometime early afternoon.
24 Q. But you don't know with any specificity,

1 A. I have no idea.
2 Q. When you arrived at the hotel what floor
3 did you go to?
4 A. I have no idea.
5 Q. Were you intoxicated when you got to the
6 hotel?
7 A. No.
8 Q. What was the name of the people you met
9 upstairs again?
10 A. Matthew Cenicola and Bruce Sirjane.
11 Q. What were they wearing?
12 A. I have no idea.
13 Q. What room were you in?
14 A. No idea.
15 Q. In hours and minutes can you tell me how
16 long you were in the room?
17 A. I have no idea.
18 Q. Other than guessing do you know exactly
19 what you had to drink in the hotel
20 before you went to the restaurant?
21 MR. FARRAH: Objection.
22 Q. Do you have any memory of having any
23 drinks at the bar at the restaurant
24 prior to sitting down?

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1 correct?
2 A. Correct.
3 Q. You can no more say that it was two
4 o'clock than four o'clock, correct?
5 MR. FARRAH: Objection.
6 MR. GILLIS: What's the
7 nature of the objection?
8 MR. FARRAH: It doesn't
9 matter. Go on.
10 MR. GILLIS: There has to be
11 a reasonable basis for your objection.
12 This is cross-examination. I can ask a
13 question.
14 MR. FARRAH: I'm objecting.
15 MR. GILLIS: You have to
16 have a basis.
17 MR. FARRAH: We'll take it
18 up with some judge at some time.
19 Q. Could it have been five o'clock?
20 MR. FARRAH: Objection.
21 A. Possibly.
22 Q. Todd picked you up at the house?
23 A. Correct.
24 Q. What was he wearing?

1 A. No.
2 Q. When you said everybody at the table had
3 a beer, that was a guess, wasn't it?
4 MR. FARRAH: Objection.
5 A. I didn't say everybody at the table had
6 a beer.
7 Q. Did you testify that everybody at the
8 table but you had a beer?
9 A. Yes.
10 Q. Is that a guess?
11 MR. FARRAH: Objection.
12 A. It's a reasonable assumption.
13 Q. It's an assumption, is that correct?
14 A. Yes.
15 Q. I'm going to show you a document that
16 has been introduced in other depositions
17 and it's represented as the bill for
18 your table that night showing two beers
19 for the entire table for the evening.
20 Does that refresh your recollection at
21 all as to whether or not everybody at
22 the table had a beer served to them?
23 MR. FARRAH: Objection.
24 A. It sounds like I was wrong.

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1 [Document entitled Longhorn
2 Steakhouse marked Michael
3 Espey Exhibit No. 2 for
4 Identification.]
5 Q. Who contacted you about this deposition?
6 A. I believe the deposition said the law
7 offices of Al Farrah.
8 Q. Have you had any phone conversations
9 with him about setting up the
10 deposition?
11 A. No.
12 Q. You hadn't been contacted by anybody in
13 Mr. Farrah's office prior to today about
14 coming in here today?
15 A. No.
16 Q. You were contacted by them for your
17 prior deposition, is that correct?
18 A. Correct.
19 Q. That was in June of 2004, correct?
20 A. Correct.
21 Q. Was your memory fresher back then than
22 it is today?
23 A. By about two years.
24 Q. When you spoke to the State Trooper when

1 MR. FARRAH: Objection.
2 A. Yes.
3 Q. If he had said that you arrived at the
4 Longhorn around 8:30 would that refresh
5 your recollection at all?
6 MR. FARRAH: Objection.
7 A. I would have to believe it.
8 Q. You don't really have a memory of what
9 time you showed up at the Longhorn that
10 night, correct?
11 A. No.
12 Q. Do you remember testifying two years ago
13 at your deposition in the other lawsuit
14 that you had eaten ribs at the Longhorn
15 that night?
16 A. I don't recall the specifics of the two
17 years ago deposition. I am looking at
18 the tab here and it says "ribs" so I
19 would assume I had ribs.
20 Q. Can you tell me why you can't remember
21 what you testified to two years ago in a
22 deposition by Mr. Farrah involving the
23 same action?
24 A. Because it was two years ago.

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1 you gave your statement that is marked
2 Exhibit 1 did he ask you what signs of
3 intoxication Mr. Southworth exhibited,
4 if any, on the evening of September 26?
5 A. I have no idea.
6 Q. You don't have any memory whatsoever of
7 Mr. Southworth exhibiting any loudness
8 on September 26, 2003 while at the
9 Longhorn, do you?
10 MR. FARRAH: Objection.
11 A. No.
12 Q. Your brother was with you on
13 September 26, 2003 at the restaurant,
14 correct?
15 A. Correct.
16 Q. What is his name again?
17 A. Thomas Scott Espey.
18 Q. Is he older or younger than you?
19 A. Younger.
20 Q. By how much?
21 A. Two years.
22 Q. After living with him for most of your
23 life does he have a reputation for
24 truthfulness?

1 Q. What does that mean?
2 A. It means there's a lot of stuff I've had
3 to know and remember and learn since
4 that day.
5 Q. Is it fair to say that over the passage
6 of time you've forgotten certain things?
7 A. Correct.
8 Q. Including facts concerning this
9 accident, correct?
10 A. Yes, sir.
11 Q. What type of truck was it that your
12 friend Bruce had?
13 A. It was a Chevy.
14 Q. Do you remember what year?
15 A. I don't know. I think it was '99, 2000,
16 2001.
17 Q. Did you meet with them the next day to
18 go to the concert?
19 A. Yes.
20 Q. Do you remember who sponsored the
21 concert?
22 A. I believe that concert was sponsored by
23 WAAF.
24 Q. And that was at the Fitchburg Airport?

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1 A. Correct.
 2 Q. Have you ever read your prior deposition
 3 in the case Mr. Farrah deposed you in?
 4 A. No.
 5 Q. Have you spoken with any of the
 6 attorneys in that case or
 7 representatives of their office other
 8 than to schedule a deposition in that
 9 case?
 10 A. No.
 11 Q. While you were at the hotel sometime
 12 before you went to the Longhorn on
 13 September 26, 2003 do you know where
 14 your brother and Mr. Southworth were?
 15 A. Riding dirt bikes.
 16 Q. Were they drinking while they were
 17 driving dirt bikes?
 18 A. I do not know. I do not believe so.
 19 Q. Did he ever tell you they were drinking
 20 while driving dirt bikes?
 21 A. No.
 22 Q. You talked earlier about your definition
 23 of intoxication and I want to make sure
 24 I have this right.

1 Longhorn, correct?
 2 A. Correct.
 3 Q. And there was still Jack Daniels and
 4 beer in the hotel, is that correct?
 5 A. As far as I can remember.
 6 Q. Was anybody guarding that or preventing
 7 anybody from drinking the Jack Daniels
 8 or the beer?
 9 MR. FARRAH: Objection.
 10 A. Not to my recollection.
 11 Q. In fact anybody was free to have
 12 whatever they wanted back at the hotel,
 13 correct?
 14 MR. FARRAH: Objection.
 15 A. Correct.
 16 Q. You had drank Jack Daniels with
 17 Mr. Southworth prior to that night at
 18 the 99 Restaurant, correct?
 19 A. Correct.
 20 Q. You knew that he drank Manhattans made
 21 of Jack Daniels, correct?
 22 A. Correct?
 23 A. And nobody was stopping him from
 24 drinking more Jack Daniels back at the

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1 Is it your understanding
 2 that others around you seem intoxicated
 3 when you are intoxicated?
 4 MR. FARRAH: Objection.
 5 A. Yes.
 6 Q. When you said that others were
 7 intoxicated was that the definition you
 8 were using?
 9 MR. FARRAH: Objection.
 10 A. Yes.
 11 Q. You weren't stating that they were
 12 intoxicated based on any visible signs
 13 that they exhibited that you saw,
 14 correct?
 15 MR. FARRAH: Objection.
 16 A. Correct.
 17 Q. In fact at no time during the time that
 18 you were at the Longhorn that night did
 19 you see Jeffrey Southworth exhibit any
 20 signs of intoxication, correct?
 21 MR. FARRAH: Objection.
 22 A. Correct.
 23 Q. You went back to the hotel afterwards
 24 with the group after you left the

1 hotel after you left the Longhorn that
 2 night, correct?
 3 MR. FARRAH: Objection.
 4 A. If he wanted it he probably could have
 5 had it.
 6 Q. And he could have drank beer as well,
 7 correct?
 8 MR. FARRAH: Objection.
 9 Q. Did you see him drinking beer back at
 10 the hotel afterwards?
 11 A. I do not recall.
 12 Q. You have testified in several of your
 13 answers "I would guess." When you
 14 answered questions "I would guess," is
 15 it fair to assume you are guessing?
 16 MR. FARRAH: Objection.
 17 A. Yes.
 18 Q. Were you, in fact, guessing on those
 19 questions?
 20 MR. FARRAH: Objection.
 21 A. Yes.
 22 Q. You answered "I think" to several
 23 questions. Do you remember starting
 24 sentences with those words?

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1 A. Yes.

2 Q. Those are also guesses.

3 MR. FARRAH: Objection.

4 A. Yes.

5 Q. And you said in a few questions "I don't
6 believe." Do you remember starting your
7 sentences prefaced with that?

8 A. Yes.

9 Q. Were those guesses?

10 MR. FARRAH: Objection.

11 A. Yes.

12 Q. When you started a sentence with "I
13 believe," were those guesstimates as
14 well?

15 MR. FARRAH: Objection.

16 A. Yes.

17 Q. Is it fair to say that your brother in
18 your opinion did not have as much to
19 drink on the night of September 26, 2003
20 that you did?

21 A. Yes.

22 Q. You're not sure where you were the next
23 morning when you woke up, correct?

24 A. Correct.

1 Q. And when you said you had one to three

2 Manhattans, that's a guess, isn't it?

3 A. Yes.

4 Q. As you sit here today you don't know
5 where your brother was when you spoke to
6 him the next day about this, correct?

7 A. Correct.

8 Q. Do you remember what time of day you
9 spoke to him?

10 A. No.

11 Q. Was it while you were at the concert, do
12 you know?

13 A. No, it was not while I was at the
14 concert.

15 Q. You know that.

16 A. I'm pretty sure it wasn't.

17 Q. Were you drinking at the concert?

18 A. No.

19 Q. When the police officer who took the
20 statement from you that has been marked
21 as Exhibit 1 came to your house, can you
22 describe him physically, what he looked
23 like, age, size, etcetera?

24 A. I remember he was younger. That's about

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Page 5

1 Q. Whether you were at home or whether you
2 were at the hotel and the reason you
3 can't remember is the passage of time
4 not because you were still intoxicated,
5 is that correct?

6 MR. FARRAH: Objection.

7 A. Probably some combination of both.

8 Q. How much did you have to drink back at
9 the hotel after you left the Longhorn?

10 MR. FARRAH: Objection.

11 A. I have no idea.

12 Q. How much did you have to drink at the
13 strip bar after you left the hotel?

14 A. No idea.

15 Q. Do you remember what you were drinking
16 at the hotel after you left the
17 Longhorn?

18 MR. FARRAH: Objection.

19 A. Not with any specificity.

20 Q. When you said, "I believe I had Jack
21 Daniels Manhattans at the restaurant,"
22 that's a guess, isn't it?

23 MR. FARRAH: Objection.

24 A. That's a guess.

1 as much as I can remember.

2 Q. You remember he drove a truck.

3 A. I remember he rides dirt bikes and HUVs.

4 Q. How old was he?

5 A. Exact age I do not know.

6 Q. Can you give me a ballpark?

7 A. Under thirty.

8 Q. Can you be any more specific than he was
9 under thirty?

10 A. Under thirty.

11 Q. Can you remember how tall he was?

12 A. I think he was shorter than me.

13 Q. You think. You're not sure?

14 A. I'm not sure.

15 Q. You don't know how tall he was.

16 A. No.

17 Q. Do you know what color hair he had?

18 A. No.

19 Q. You were sober when you talked to him,
20 correct?

21 A. Yes.

22 Q. You can't remember due to the passage of
23 time, is that correct?

24 A. Correct.

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Page 5

1 Q. You can't remember whether or not you
2 had a cell phone in 2003, is that
3 correct?
4 A. Correct.
5 Q. That is not due to any intoxication,
6 correct?
7 A. Correct.
8 Q. In fact as you sit here today you don't
9 even know what your brother's cell phone
10 number is without looking it up on your
11 phone, correct?
12 A. Correct.
13 Q. In your prior deposition do you remember
14 testifying that when Mr. Southworth is
15 intoxicated he gets belligerent?
16 MR. FARRAH: Objection.
17 Q. You said, "I do know that to be true of
18 Mr. Southworth." He never exhibited any
19 signs of being belligerent on
20 September 26, 2003, is that correct?
21 MR. FARRAH: Objection.
22 A. Not that I recall.
23 Q. He didn't show any signs of slurred
24 speech on September 26, 2003, correct?

1 correct?
2 A. Correct.
3 Q. You didn't tell anybody at the Longhorn
4 that, did you?
5 A. No.
6 Q. Do you remember testifying that it was
7 your idea to order the Manhattans that
8 night at the Longhorn?
9 MR. FARRAH: Objection.
10 A. No, I do not remember that.
11 Q. Isn't it fair to say that the signs of
12 intoxication you saw, if any, of
13 Mr. Southworth on the night of
14 September 26, 2003 were back in the
15 hotel or at the strip joint?
16 MR. FARRAH: Objection.
17 A. It's possible.
18 Q. Do you know that Mr. Southworth had done
19 drugs back in high school?
20 A. Yes.
21 Q. What do you know about that?
22 MR. FARRAH: Objection. You
23 are asking for personal knowledge?
24 Q. Whatever knowledge you have from

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Page 6

1 MR. FARRAH: Objection.
2 A. Not that I recall.
3 Q. When you drank with him at the 99 you
4 said he showed some visible signs of
5 intoxication, isn't that correct?
6 A. I do not recall.
7 Q. Have you ever been with Mr. Southworth
8 at the Longhorn Restaurant in Leominster
9 prior to September 26, 2003?
10 A. I do not believe so.
11 Q. Did Mr. Southworth have a reputation in
12 town prior to September 26, 2003 of
13 being a troublemaker?
14 A. Yes.
15 Q. He wasn't a troublemaker on
16 September 26, 2003, was he?
17 MR. FARRAH: Objection.
18 A. Not that I recall.
19 Q. He didn't pick any fights at the
20 Longhorn, did he?
21 A. No.
22 Q. You were aware that Mr. Southworth's
23 Massachusetts driver's license was
24 suspended on September 26, 2003,

1 whatever source.
2 A. I don't know exactly what types of drugs
3 or anything like that, but I'm sure he
4 enjoyed partying like anybody else in
5 high school.
6 Q. When you say partying like anyone else
7 in high school you mean alcohol and some
8 form of drug, correct?
9 A. Correct.
10 Q. What would be the drug of choice?
11 MR. FARRAH: Objection.
12 Q. Pot or something more?
13 A. I'm sure that he smoked weed.
14 Q. Was anybody smoking pot back at the
15 hotel after you left the Longhorn on
16 September 26, 2003?
17 A. I do not believe so.
18 Q. Are you sure one way or the other?
19 MR. FARRAH: Objection.
20 A. No.
21 Q. Do you have a memory as to how many
22 people were with you that evening at the
23 Longhorn when you were there?
24 MR. FARRAH: Objection.

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1 A. How many people were with me?
 2 Q. How many people, if you remember, were
 3 at the table with you when you were
 4 sitting down at the Longhorn on
 5 September 26, 2003?
 6 MR. FARRAH: Objection.
 7 A. I know that there were seven of us.
 8 Q. Seven including you?
 9 A. Including me.
 10 Q. Have you ever been dirt biking with
 11 Mr. Southworth?
 12 A. I do now.
 13 Q. Is there any particular reason you
 14 didn't go dirt biking with him?
 15 A. I didn't ride dirt bikes at that time.
 16 Q. You have had dirt bikes since that time.
 17 A. Correct.
 18 Q. The friends you had that were there,
 19 they were from Vermont, is that correct?
 20 A. Correct.
 21 Q. And you met them in college up at
 22 Castleton, is that correct?
 23 A. Correct.
 24 Q. Do they live in Vermont?

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1 A. No. One actually lives in New York and
 2 one is originally from New Jersey.
 3 Q. When you were in college with them did
 4 either of them smoke any pot in college?
 5 MR. FARRAH: Objection.
 6 A. Yes.
 7 Q. Did you ever smoke any pot with them
 8 back in college?
 9 A. Yes.
 10 Q. Were they continuing to smoke pot in
 11 2003?
 12 A. I don't know.
 13 Q. Do you know approximately what time you
 14 left to go to the Other Side from the
 15 hotel on September 26, 2003?
 16 A. I have no idea.
 17 Q. During the evening of September 26, 2003
 18 at any time from the time you first
 19 arrived at the hotel until after you
 20 left the Other Side did you stop
 21 drinking at any time period and by that
 22 I don't mean for two seconds, for an
 23 appreciable period of time?
 24 MR. FARRAH: Objection.

Page 6

1 A. No.
 2 Q. So you continued to drink after Longhorn
 3 back at the hotel, correct?
 4 MR. FARRAH: Objection.
 5 A. Correct.
 6 Q. And then at the Other Side, correct?
 7 A. Correct.
 8 Q. Did you go anywhere after the Other
 9 Side?
 10 A. Not that I recall.
 11 Q. Did you have anything to drink in the
 12 vehicle on your way to and from the
 13 Other Side?
 14 A. I would say no.
 15 Q. So you were not so intoxicated that you
 16 don't remember whether or not you were
 17 drinking at a certain point, correct?
 18 A. I know that Todd as the driver would not
 19 have allowed us to drink in the car.
 20 Q. In your statement which has been marked
 21 as Exhibit 1 you said, "They met us for
 22 dinner. We ate dinner and had a couple
 23 drinks. I can't remember who drank what
 24 or how much but I think it was mostly

Page 6

1 beers and Manhattans." Did I read that
 2 correctly?
 3 A. Yes.
 4 Q. When you said you met them and had
 5 drinks, you have no idea of the quantity
 6 that each individual had to drink,
 7 correct?
 8 MR. FARRAH: Objection.
 9 A. Yes.
 10 Q. In fact you don't know whether each
 11 individual didn't drink at all other
 12 than Jude, correct?
 13 A. Correct.
 14 Q. Did the police ask you if you were
 15 intoxicated that evening?
 16 A. No. I don't remember.
 17 Q. You don't remember or they didn't ask
 18 you?
 19 A. I don't remember.
 20 Q. What did the police from what you
 21 remember ask you to write that evening?
 22 A. I believe they asked me to give them a
 23 sworn statement.
 24 Q. You knew that this sworn statement was

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Page 6

1 to be used as evidence against
2 Mr. Southworth in the criminal trial,
3 correct?

4 MR. FARRAH: Objection.

5 A. I assumed so.

6 Q. You assumed they were trying to prove he
7 was operating a motor vehicle when he
8 was under the influence of alcohol,
9 correct?

10 MR. FARRAH: Objection.

11 A. I assume so.

12 Q. You assumed they were looking for
13 evidence from you that he was
14 intoxicated at some point, correct?

15 MR. FARRAH: Objection.

16 A. Correct.

17 Q. And at no point did you tell them that
18 he was intoxicated, correct?

19 MR. FARRAH: Objection.

20 A. Correct.

21 Q. That was something they would have asked
22 you to put in the statement if it was
23 true, correct?

24 MR. FARRAH: Objection.

1 Q. Did you know the server that served you
2 at the Longhorn on the night of
3 September 26, 2003?

4 A. No.

5 Q. Prior to this night how many times had
6 you been in the Longhorn, if you have a
7 memory?

8 A. Once or twice.

9 Q. And who was with you when you were there
10 those other times?

11 A. My brother and one of his friends.

12 Q. Were you ever there previously with
13 Mr. Southworth?

14 A. No.

15 Q. Do you remember being carded when you
16 came to the Longhorn that evening?

17 A. I do not recall.

18 Q. You have no memory of Mr. Southworth's
19 eyes being glassy while you were at the
20 Longhorn Restaurant on September 26,
21 2003, is that correct?

22 A. Correct.

23 Q. You have no memory of him slurring his
24 speech at the Longhorn Restaurant on

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1 A. Yes.

2 Q. If you thought he was intoxicated and
3 the police came to your house and asked
4 you if he was would you have lied for
5 Mr. Southworth?

6 MR. FARRAH: Objection.

7 A. No.

8 Q. If he was intoxicated and the police
9 came and got a report for a criminal
10 trial against him for driving under the
11 influence you would have written that in
12 the statement if you were asked and it
13 was correct.

14 MR. FARRAH: Objection.

15 A. Yes.

16 Q. Do you remember them asking you whether
17 or not Mr. Southworth at any time that
18 evening showed visible signs of
19 intoxication?

20 A. I do not remember.

21 Q. But you understood that was what they
22 were after.

23 MR. FARRAH: Objection.

24 A. Correct.

1 September 26, 2003, correct?

2 A. Correct.

3 Q. You have no memory of him being unsteady
4 on his feet at the Longhorn Restaurant
5 on September 26, 2003, is that correct?

6 A. Correct.

7 Q. You have no memory of him picking a
8 fight with anybody at the Longhorn
9 Restaurant on September 26, 2003,
10 correct?

11 A. Correct.

12 Q. You have nothing more than a guess as to
13 what, if anything, Mr. Southworth had to
14 drink at the Longhorn Restaurant on
15 September 26, 2003, correct?

16 MR. FARRAH: Objection.

17 A. Correct.

18 Q. Can you describe what the waitress
19 looked like who served you the food at
20 the Longhorn Restaurant on September 26,
21 2003?

22 A. I have no idea.

23 Q. Have you ever been to Chopsticks?

24 A. Yes.

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1 Q. Can you tell me what type of place that
2 is?

3 A. A Chinese restaurant.

4 Q. Does it have a bar?

5 A. I don't know. I think so.

6 Q. How would you describe the Longhorn
7 Restaurant, as a family restaurant or is
8 it a bar? How would you characterize
9 it?

10 MR. FARRAH: Objection.

11 A. I would not characterize it as a bar.

12 Q. Could you please characterize for me the
13 Longhorn Restaurant in Leominster, MA
14 based on your experience of having been
15 there?

16 MR. FARRAH: Objection.

17 A. It's a steakhouse.

18 Q. Is that someplace you and your friends
19 would go at night primarily to drink or
20 primarily to eat?

21 MR. FARRAH: Objection.

22 A. Primarily to eat.

23 Q. If you and your friends wanted to go
24 someplace just to drink where would you

1 ago about anything related to the case?

2 A. No.

3 Q. Were you smoking marijuana at any point
4 in time on September 26, 2003?

5 A. Not that I recall.

6 Q. Was anyone in your party at the Four
7 Points smoking marijuana before you went
8 to the Longhorn that day?

9 A. Not that I recall.

10 Q. To the extent you have a memory that you
11 returned from the Longhorn to the Four
12 Points at some point in time did you see
13 anyone smoking marijuana at the Four
14 Points after the Longhorn that day?

15 A. Not that I recall.

16 Q. Did you smell the smell of marijuana at
17 any point in time while you were at the
18 Four Points that day?

19 A. Not that I recall.

20 Q. Where is Chopsticks Restaurant?

21 A. Chopsticks is in Leominster by the Sears
22 Town Mall.

23 Q. Was there any discussion among your
24 group that evening about going to

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1 go?

2 MR. FARRAH: Objection.

3 A. A bar.

4 Q. What bar?

5 A. There are so many of them. There isn't
6 one specific spot.

7 Q. The Longhorn isn't a place you would go
8 primarily to drink, correct?

9 MR. FARRAH: Objection.

10 A. Correct.

11 Q. That was not your intention on
12 September 26, 2003 was it?

13 A. No?

14 MR. GILLIS: I have no
15 further questions.

16 REDIRECT EXAMINATION

17 BY MR. FARRAH

18 Q. Prior to your deposition of two years
19 ago did you speak to anyone in my office
20 about anything except getting directions
21 to the deposition?

22 A. No.

23 Q. Did you speak with me, for example,
24 prior to your deposition of two years

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1 Chopsticks?

2 A. Not that I recall.

3 Q. Have you ever been to Chopsticks with
4 Mr. Southworth?

5 A. No.

6 Q. Prior to today you had not spoken to
7 Mr. Gillis, is that right?

8 A. Correct.

9 Q. Nor anyone from his office?

10 A. Correct.

11 Q. Or anyone who you understood was
12 representing the defendant Rare
13 Hospitality or assisting in the
14 representation of Rare Hospitality, is
15 that right?

16 A. Correct.

17 MR. FARRAH: Thank you.

18 RECROSS-EXAMINATION

19 BY MR. GILLIS

20 Q. Four Points is within a quarter of a
21 mile from the Longhorn, correct?

22 A. No.

23 Q. How far is the Four Points from the
24 Longhorn Steakhouse?

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Page

1 A. It might be a mile away at the most.
 2 Q. A two-minute ride, correct?
 3 MR. FARRAH: Objection.
 4 A. About that.
 5 Q. And Chopsticks is about the same
 6 distance, correct?
 7 A. A little bit further.
 8 Q. When you answered that you did not
 9 recall whether or not people were
 10 smoking pot or you smelled pot is it
 11 fair to say you don't have a memory when
 12 you say you don't recall?
 13 A. Correct.
 14 MR. GILLIS: Thank you.
 15 FURTHER REDIRECT EXAMINATION
 16 BY MR. FARRAH
 17 Q. Was anyone smoking pot that evening at
 18 the Four Points?
 19 A. I do not remember.
 20 Q. If someone was smoking do you think you
 21 would remember?
 22 MR. GILLIS: Objection.
 23 A. Probably not.
 24 MR. FARRAH: That's all I

1 SIGNATURE PAGE/ERRATA SHEET
 2 Re: Nancy Rosario
 Vs: Rare Hospitality International, Inc.,
 3 d/b/a
 4/25/2006 - Deposition of MICHAEL ESPEY
 4
 5 I, MICHAEL ESPEY, do hereby certify that
 6 I have read the foregoing transcript of my
 7 testimony and it is a true and correct record
 of my testimony (with the exception of the
 corrections, if any, listed below.

8 PAGE LINE CORRECTION
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20 DATE MICHAEL ESPEY
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Page 74

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1 have.
 2 [The deposition was
 3 concluded.]
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1 CERTIFICATE
 2 COMMONWEALTH OF MASSACHUSETTS)
 3 COUNTY OF SUFFOLK)
 4 I, Rosamond K. Marcy, Certified
 5 Shorthand/Registered Professional Reporter, a
 6 Notary Public in and for the Commonwealth of
 7 Massachusetts, do hereby certify:
 8 That MICHAEL ESPEY, the witness whose
 9 deposition is hereinbefore set forth, was
 10 duly sworn by me and that such deposition is
 11 a true record of the testimony given by said
 12 witness.
 13 I further certify that I am not related
 14 to any of the parties to this action by blood
 15 or marriage, and that I am in no way
 16 interested in the outcome of this matter.
 17 IN WITNESS WHEREOF, I have hereunto set
 18 my hand and affixed my seal of office this
 19 23rd day of May, 2006.
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ROSAMOND K. MARCY

My commission expires:
 April 6, 2012.

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Page 1

1 Volume:
2 Pages: 1 - 158
3 Exhibits: 1

4 UNITED STATES DISTRICT COURT
5 DISTRICT OF MASSACHUSETTS

6 Civil Action #05-CV-10617MLW

7 NANCY ROSARIO, INDIVIDUALLY,
8 AS SHE IS THE ADMINISTRATRIX
9 OF THE ESTATE OF ANILDA SANTIAGO,
10 ESSEX PROBATE COURT DOCKET #03P-2499AD1,
11 P/P/A VERONICA ROSARIO AND
12 CHRISTINA SANTIAGO, AND AS SHE IS
13 THE ADMINISTRATRIX OF THE ESTATE
14 OF JOSE SANTIAGO, BERLIN (CONNECTICUT)
15 PROBATE COURT, CASE #03-0713,
16 Plaintiff
17 vs.
18 RARE HOSPITALITY INTERNATIONAL, INC., d/b/a
19 LONGHORN STEAKHOUSE,
20 Defendant

21 Deposition of THOMAS SCOTT ESPEY, a
22 witness called on behalf of the Plaintiff,
23 pursuant to the Federal Rules of Civil
24 Procedure, before Rosamond K. Marcy, a
Certified Shorthand/Registered Professional
Reporter and Notary Public in and for the
Commonwealth of Massachusetts, at the Offices
of Albert L. Farrah, Jr., Esquire, One
Washington Mall, Boston, Massachusetts 02108,
commencing at 12:15 P.M. on Tuesday,
April 25, 2006.

Page 2

1 APPEARANCES:

2 ALBERT L. FARRAH, JR., ESQUIRE
3 One Washington Mall
4 Boston, Massachusetts 02108
5 for the Plaintiff.

6 MICHAEL K. GILLIS, ESQUIRE
7 [Gillis & Bikofsky, P.C.]
8 1150 Walnut Street
9 Newton, Massachusetts 02461
10 for the Defendant.

11 NEIL D. SCHNURBACH, ESQUIRE
12 [Gillis & Bikofsky, P.C.]
13 1150 Walnut Street
14 Newton, Massachusetts 02461
15 for the Defendant.

Page

1 I N D E X

2 Deposition of: DIRECT CROSS REDIRECT RECROSS

3 THOMAS SCOTT ESPEY

4 (By Mr. Farrah) 4 145

5 (By Mr. Gillis) 101 155

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7

8 E X H I B I T S

9 Thomas Scott Espey
10 Number: For Ident.

11 1 - Handwritten document by
12 Scott Espey 71

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Page 4

1 STIPULATIONS

2 It is hereby stipulated and

3 agreed by and between counsel for the

4 respective parties that the witness will

5 read and sign the deposition transcript

6 within thirty days. The sealing and

7 filing of the deposition transcript are

8 waived.

9 It is further stipulated and

10 agreed that all objections, except as to

11 form, and motions to strike will be

12 reserved to the time of trial.

13 THOMAS SCOTT ESPEY,

14 a witness called on behalf of the

15 Plaintiff, having first been properly

16 identified and duly sworn, deposes and

17 says as follows:

18 DIRECT EXAMINATION

19 BY MR. FARRAH

20 Q. Good afternoon. My name is Albert

21 Farrah and I represent the plaintiff

22 Nancy Rosario in this action which has

23 been brought against Rare Hospitality,

24 Inc., the owner of the Longhorn

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Page 7

1 Steakhouse in Leominster, MA. You do
2 know that my questions and your answers
3 are being transcribed and at the end of
4 the deposition a transcript of your
5 testimony will be made and sent to you.
6 You will have thirty days from your
7 receipt of that transcript to indicate
8 on a separate piece of paper which you
9 will sign any changes you think should
10 be made in the transcript. Do you
11 understand all of that?

12 A. I do.

13 Q. And if you don't send it back to us,
14 that is the sheet with any changes that
15 you want made, by the end of that thirty
16 days then the transcript as it was sent
17 to you will be the transcript that is
18 used in the case.

19 Can you tell us your full
20 name, please.

21 A. Thomas Scott Espey.

22 Q. What's your date of birth?

23 A. 10/6/1981.

24 Q. And your Social Security number?

1 Q. Calling your attention back to
2 September 26, 2003 were you that day in
3 the company of Jeffrey Southworth?

4 A. I was.

5 Q. For how long prior to September 26, 2003
6 had you known Mr. Southworth?

7 A. I had known him on and off for a while.
8 I didn't really start associating with
9 him until that summer.

10 Q. Can you tell me on how many occasions
11 during the summer of 2003 you were in
12 the company of Mr. Southworth?

13 A. I don't know. We used to go ride dirt
14 bikes frequently.

15 Q. How frequently?

16 A. Several times a week.

17 Q. And after dirt biking did Mr. Southworth
18 and you from time to time go to the
19 Longhorn Restaurant in Leominster, MA?

20 A. Yes.

21 Q. Can you tell me your best memory of the
22 number of times during the summer of
23 2003 that Mr. Southworth and you went to
24 the Longhorn Restaurant in Leominster

Page 6

Page 8

1 A. 034-68-0394.

2 Q. Where do you live?

3 A. 80 Old Mill Road, Harvard, MA.

4 Q. You live there with your parents, is
5 that correct?

6 A. Correct.

7 Q. And your brother?

8 A. Same residence.

9 Q. Can you tell me briefly what your
10 educational background is?

11 A. I graduated from Bromfield High School
12 in Harvard in 2000. I just graduated
13 from UMass. Lowell last spring, 2005.

14 Q. What did you get your degree in?

15 A. Bachelor's in Accounting and Finance.

16 Q. Are you currently employed?

17 A. I am.

18 Q. Where?

19 A. Akamai Technology.

20 Q. In what capacity?

21 A. I am a revenue accountant.

22 Q. And you are a new hire there, is that
23 right?

24 A. That's correct.

1 MA?

2 A. I don't know a number.

3 Q. Was it more frequently than once a month
4 during the summer?

5 A. Probably, yes.

6 Q. Was it more frequently than once every
7 two weeks that you went to the
8 Leominster Longhorn?

9 A. Again I don't know.

10 Q. At what time on September 26, 2003 did
11 you first come into Mr. Southworth's
12 company?

13 A. Probably sometime after work, three or
14 four.

15 Q. Where was it that you and he first
16 hooked up?

17 A. I believe in Littleton.

18 Q. Where in Littleton?

19 A. At my grandmother's apartment complex.

20 Q. Do you know where that's located in
21 Littleton?

22 A. It's called Pond Side Apartments.

23 Q. Where in Littleton are the Pond Side
24 Apartments?

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1 A. 2A and 495.
 2 Q. At the intersection of 2A and 495, is
 3 that right?
 4 A. Correct.
 5 Q. Had the two of you by pre-arrangement
 6 agreed to meet at your grandmother's
 7 apartment complex that day?
 8 A. I believe so, yes.
 9 Q. Where did you go from the Pond Side
 10 Apartments that day?
 11 A. Templeton, MA.
 12 Q. How did you get to Templeton, MA that
 13 day?
 14 A. One of us drove his truck.
 15 Q. Was it you who drove his truck?
 16 A. I believe so.
 17 Q. Is there any question in your mind about
 18 whether it was you who drove the truck
 19 to Templeton from the Pond Side
 20 Apartments?
 21 A. Whatever I said in my previous statement
 22 would be better to go by.
 23 Q. Do you have a memory as you sit here now
 24 whether you drove from the Pond Side

Page 10

1 Apartments to Templeton?
 2 A. Again I don't.
 3 Q. Do you have a memory?
 4 A. I don't know who drove. I believe it
 5 was me. I believe I said before it was
 6 me.
 7 Q. What did you do when you got to
 8 Templeton?
 9 A. We unloaded our bikes and rode for a
 10 couple of hours.
 11 Q. Dirt bikes, is that right?
 12 A. Correct.
 13 Q. Do you know the location of the place
 14 you dirt biked in Templeton?
 15 A. It's off of Route 202.
 16 Q. Does it have a name?
 17 A. No.
 18 Q. Were you alone dirt biking that day?
 19 A. No.
 20 Q. Who else was with you and Mr. Southworth
 21 dirt biking that day?
 22 A. Jude Connelly and his brother Dillon.
 23 Q. After dirt biking that day did you go to
 24 the Longhorn Steakhouse?

Page 11

1 A. Yes.
 2 Q. And who drove to the Longhorn
 3 Steakhouse?
 4 A. Again I believe I did but I'm not
 5 positive.
 6 Q. Did you know at the time, that is as of
 7 September 26, 2003, whether or not
 8 Jeffrey's license to drive in
 9 Massachusetts had been suspended?
 10 A. I know he had a New Hampshire license.
 11 Q. Did he tell you that his Massachusetts
 12 license had been revoked?
 13 A. I believe it had been suspended.
 14 Q. And is that why you drove that day?
 15 A. I believe so.
 16 Q. Do you have a memory that that's why you
 17 drove?
 18 A. I think so. I know he had a
 19 New Hampshire license, though.
 20 Q. Is it accurate to say that you
 21 frequently, after dirt biking with
 22 Jeffrey Southworth, went to the Longhorn
 23 Steakhouse during that summer?
 24 MR. GILLIS: I'm going to

Page 12

1 make objections and when I ask you
 2 questions Mr. Farrah will make
 3 objections but you still testify. We
 4 have legal reasons to object but you
 5 still answer the questions.
 6 A. We went there once in a while.
 7 Q. My question is is it accurate to say you
 8 frequently went there after dirt biking?
 9 MR. GILLIS: Objection.
 10 A. We went there a couple of times. I
 11 don't know frequently.
 12 Q. Do you have a memory of whether or not
 13 you went there frequently after dirt
 14 biking?
 15 MR. GILLIS: Objection.
 16 A. Again we went there several times that
 17 summer.
 18 Q. Do you remember testifying earlier in a
 19 deposition in a related case?
 20 A. I do.
 21 Q. In my office.
 22 A. Yes.
 23 Q. This same room, remember that?
 24 A. Yes.

Page 13

1 Q. Do you remember testifying that you went
 2 there frequently, that is to the
 3 Longhorn, after dirt biking, if you
 4 remember?
 5 MR. GILLIS: Just for the
 6 record you are showing him a record.
 7 The question was does he remember
 8 testifying they went there frequently.
 9 [Witness examining
 10 document.]
 11 Q. Have you looked at what I pointed out to
 12 you?
 13 A. I'm not exactly sure which highlighted
 14 section you were pointing out.
 15 Q. Right there.
 16 A. I did testify to that.
 17 Q. You said you went there frequently, is
 18 that right?
 19 A. Correct.
 20 Q. Does that refresh your memory that you
 21 went there frequently after dirt biking?
 22 MR. GILLIS: Objection.
 23 A. Sure.
 24 Q. Did you have a regular waitress at the

Page 14

1 Longhorn that summer?
 2 A. I don't know.
 3 Q. Do you remember any of the waitresses
 4 that waited on Jeffrey and you at the
 5 Longhorn that summer?
 6 A. No, not any more.
 7 Q. Do you know what time you left Templeton
 8 on September 26, 2003 to go to the
 9 Longhorn?
 10 A. Probably right around sunset.
 11 Q. Did you have any alcoholic beverage to
 12 drink in Templeton before you left for
 13 the Longhorn?
 14 A. I believe we had a beer.
 15 Q. You had a beer?
 16 A. Yes.
 17 Q. Did Jeff have a beer?
 18 A. I believe so.
 19 Q. Do you have any memory that Jeff had a
 20 beer that day at Templeton before you
 21 went to the Longhorn?
 22 A. I believe we had a beer.
 23 Q. When you say you believe, do you mean
 24 it's your best memory that you had a

Page 15

1 beer?
 2 MR. GILLIS: Objection.
 3 A. Yes.
 4 Q. Had you brought a cooler?
 5 A. I did.
 6 Q. Was there a six-pack of beer in that
 7 cooler?
 8 A. I believe so.
 9 Q. Is that your best memory?
 10 A. It is.
 11 Q. Was it Bud Light beer?
 12 A. I believe so.
 13 Q. Is that your best memory?
 14 A. It is.
 15 MR. GILLIS: Objection.
 16 Just for the record if you have a memory
 17 please state it but if you are guessing
 18 please don't guess.
 19 Q. Did you have more than one beer at
 20 Templeton that night?
 21 A. I don't believe so.
 22 Q. Did Jeff have more than one beer at
 23 Templeton that night?
 24 A. I don't believe so.

Page 16

1 Q. That's your best memory?
 2 A. It is.
 3 Q. The beer that you had at Templeton was
 4 how big, if you remember?
 5 A. I don't remember.
 6 Q. Approximately how long did it take to
 7 get from Templeton to the Longhorn
 8 Steakhouse?
 9 A. Twenty minutes, twenty-five minutes.
 10 Q. Do you know what route you traveled?
 11 A. Route 2.
 12 Q. Route 202 to Route 2, is that right?
 13 A. Correct.
 14 Q. Did you drive from Templeton to the
 15 Longhorn?
 16 A. I believe so.
 17 Q. Is that your best memory?
 18 A. It is.
 19 Q. Did you drive his truck that summer
 20 previous to September 26, 2003?
 21 A. I did.
 22 Q. Is that your best memory?
 23 MR. GILLIS: Objection.
 24 A. It is.

Page 17

1 Q. In the truck from Templeton to the
 2 Longhorn were who that night?
 3 A. Myself, Jeff, and Jude.
 4 Q. Where was Jude sitting?
 5 A. In the back seat.
 6 Q. Did Jeff have his dogs with him that
 7 day?
 8 A. Yes.
 9 Q. The two rottweilers?
 10 A. Yes.
 11 Q. And was it a truck that had two bench
 12 seats, front and back?
 13 A. Yes.
 14 Q. Did anyone have any alcoholic beverages
 15 to drink on the ride from Templeton to
 16 the Longhorn?
 17 A. I don't recall.
 18 Q. Do you have any memory of anyone having
 19 any alcoholic beverages on that ride?
 20 A. It doesn't stand out.
 21 Q. Where was the cooler?
 22 A. Probably in the bed of the truck.
 23 Q. Do you have a memory of where it was?
 24 A. No.

Page 18

1 Q. Approximately what time did you get to
 2 the Longhorn?
 3 A. I'd say twenty-five minutes after we
 4 left Templeton.
 5 Q. Can you fix the time for me, your best
 6 memory of when you arrived?
 7 A. I can't. I don't know.
 8 Q. Were you wearing a watch?
 9 A. No.
 10 Q. Do you typically wear a watch?
 11 A. Only when I dress up.
 12 Q. Did you have a cell phone then?
 13 A. I did.
 14 Q. What was the number?
 15 A. I don't know.
 16 Q. Who was the carrier?
 17 A. Verizon.
 18 Q. Do you have a cell phone today?
 19 A. I do.
 20 Q. What is the number?
 21 A. 978-407-3115.
 22 Q. Who is your carrier today?
 23 A. Cingular.
 24 Q. You switched at some point in time, is

Page 19

1 that correct?
 2 A. Yes.
 3 Q. Do you know when, approximately?
 4 A. Last summer.
 5 Q. And you switched from Verizon to
 6 Cingular?
 7 A. Yes.
 8 Q. As far as you know did you have that
 9 number in 2003 with Verizon that you had
 10 last summer when you switched?
 11 A. Yes.
 12 Q. The same number.
 13 A. Yes.
 14 Q. Do you have any memory as you sit here
 15 now what that number was?
 16 A. 978. That's the best I can do.
 17 Q. When you got to the Longhorn Steakhouse
 18 did you go to the bar?
 19 A. Yes.
 20 Q. Do you remember where at the bar you
 21 went?
 22 A. I don't.
 23 Q. Who did you go to the bar with?
 24 A. Jeff, myself, and Jude.

Page 20

1 Q. Did you order anything at the bar?
 2 A. I ordered a beer.
 3 Q. What size beer was it?
 4 A. Tall.
 5 Q. Twenty-five-ounce?
 6 A. Yes.
 7 Q. What did Jeff order, if anything?
 8 A. The same thing.
 9 Q. Bud Light?
 10 A. Yes.
 11 Q. What did Jude order?
 12 A. A non-alcoholic beverage.
 13 Q. Did Jude have any beer at Templeton
 14 after you were dirt biking?
 15 A. I don't recall.
 16 Q. Did Jude have any alcoholic beverages to
 17 drink while you were at the Longhorn
 18 Restaurant on September 26, 2003?
 19 A. I don't recall.
 20 Q. Do you have any memory of Jude having
 21 any alcoholic beverages to drink?
 22 A. I don't.
 23 Q. Did anyone ask you when you went to the
 24 bar at the Longhorn Restaurant to

Page 21

1 produce an I.D. or a driver's license?
 2 A. I believe so.
 3 Q. Did they ask Jude for that as well?
 4 A. I don't know.
 5 Q. How many beers did you have at the bar?
 6 A. I believe we only ordered one and we got
 7 our table.
 8 Q. My question is how many beers did you
 9 have at the bar, your best memory?
 10 MR. GILLIS: Objection.
 11 Asked and answered.
 12 A. Not even a full one.
 13 Q. How long were you at the bar?
 14 A. A few minutes.
 15 Q. What's your best memory?
 16 A. Fifteen, twenty minutes maybe.
 17 Q. Did you pay for that beer at the bar?
 18 A. I can't recall.
 19 Q. How many beers did Jeff have at the bar?
 20 A. I can't recall.
 21 Q. Did he have more than one?
 22 A. I can't recall again.
 23 Q. Who paid for the beers at the bar?
 24 MR. GILLIS: Objection.

Page 22

1 A. Again I can't recall.
 2 Q. You don't know if you paid or Jeff paid?
 3 A. I don't.
 4 Q. While you were at the bar were you
 5 talking to anyone else besides Jeff and
 6 Jude?
 7 A. I can't recall.
 8 Q. What's your best memory of how long you
 9 were at the bar before you were seated
 10 at a table?
 11 A. A few minutes.
 12 Q. Do you remember testifying in a
 13 deposition taken on June 22, 2004 in
 14 this office?
 15 A. Yes.
 16 Q. Do you remember being asked the question
 17 on Page 70, "And it's your best memory
 18 that you were about half an hour at the
 19 bar, is that right, before you were
 20 seated for a table?" Do you remember
 21 being asked that question?
 22 A. I do now.
 23 Q. Do you remember your answer was,
 24 "Somewhere in that range"? Do you

Page 23

1 remember that?
 2 A. That's what it says.
 3 Q. Was your memory of the events of the
 4 night of September 26, 2003 better on
 5 June 22, 2004 than it is today?
 6 A. I would think so.
 7 Q. Is that your better sense that your
 8 memory was better then than it is now?
 9 A. I would think it was better then than it
 10 is now.
 11 Q. Is that your belief, that your memory
 12 was better then than it is now?
 13 MR. GILLIS: Objection.
 14 A. I would believe so.
 15 Q. So is your memory refreshed now that you
 16 were seated at the bar for about half an
 17 hour before you were at a table?
 18 MR. GILLIS: Objection.
 19 A. Again, I said we were there for a few
 20 minutes.
 21 Q. Half an hour doesn't mean a few minutes
 22 to you, does it?
 23 A. I said fifteen or twenty minutes.
 24 Q. At your deposition you said somewhere in

Page 24

1 the range of half an hour, isn't that
 2 right?
 3 MR. GILLIS: Objection.
 4 That's not what he said. That's what
 5 you said. There's no testimony prior to
 6 Page 70 that says he was there a half an
 7 hour. That's you saying a half an hour
 8 and you are asking him to adopt your
 9 testimony.
 10 MR. FARRAH: Which
 11 apparently he did.
 12 MR. GILLIS: He didn't say
 13 he was there half an hour. You said it
 14 and he responded to what you said was
 15 the time.
 16 Q. And the question was, "And it's your
 17 best memory that you were about half an
 18 hour at the bar, is that right, before
 19 you were seated for a table?" The
 20 answer was, "Somewhere in that range,"
 21 isn't that right?
 22 A. Yes.
 23 Q. You called before you arrived at the bar
 24 that day, is that right?

Page 25

1 A. Correct.
2 Q. Was that something you typically did
3 when Jeff and you were coming into the
4 Longhorn, call ahead?
5 A. Yes, sometimes.
6 Q. And your cell phone number at the time
7 was 978-302-9620?
8 A. That's what I said there.
9 Q. Does that refresh your memory as to what
10 your cell phone number was back then?
11 A. Yes.
12 Q. What did you say when you called in?
13 A. I was trying to make a reservation.
14 Q. For how many people?
15 A. I don't know. Three? We were supposed
16 to meet a bunch of people there.
17 Q. Do you remember how many people you
18 asked to make a reservation for?
19 A. I don't.
20 Q. At some point in time you communicated
21 with your brother about being at the
22 Longhorn that night, is that right?
23 A. That is correct.
24 Q. Do you remember when you did?

Page 26

1 A. I don't.
2 Q. Was it earlier that day that your
3 brother and you had agreed to hook up at
4 the Longhorn that night?
5 A. I don't think so.
6 Q. Did you call your brother or did your
7 brother call you about getting together
8 at the Longhorn that night?
9 A. I don't recall.
10 Q. Do you remember what either of you said
11 to the other about getting together at
12 the Longhorn that night?
13 A. I think we were both in the area and he
14 had friends and I had friends.
15 Q. And you agreed to try to get together,
16 is that right?
17 A. Yes.
18 Q. Was your brother already at the
19 restaurant before you arrived?
20 A. No, I don't think so.
21 Q. Do you know how long it was after you
22 arrived at the restaurant that you first
23 saw your brother?
24 A. I don't.

Page 27

1 Q. Do you have any way of estimating for me
2 how long it was?
3 A. I believe it was before we got a table.
4 Q. Do you remember seeing your brother at
5 the bar at the Longhorn that night?
6 A. Briefly.
7 Q. What was he drinking at the bar?
8 MR. GILLIS: Objection.
9 A. I don't recall.
10 Q. From the time you arrived at the
11 Longhorn until you left how many beers
12 did you have?
13 A. I don't know.
14 Q. From the time you arrived at the
15 Longhorn until you left did you have any
16 Jack Daniels Manhattans?
17 A. I may have.
18 Q. Do you have a memory of having a Jack
19 Daniels Manhattan?
20 A. I believe so.
21 Q. Is it your best memory that you had more
22 than one Jack Daniels Manhattan that
23 evening?
24 MR. GILLIS: Objection.

Page 28

1 A. I don't remember it.
2 Q. Do you remember being asked a question
3 at your deposition on the bottom of
4 Page 73 and continuing to Page 74, "Let
5 me ask you this. From the time that you
6 got there, how much did you have to
7 drink while you were at the Longhorn?"
8 Your answer was, "A beer or two. From
9 when I -- can you --" I asked the
10 question again, "Until you left. From
11 when you got there until you left, how
12 much did you have to drink?" Do you
13 remember answering, "I would have to say
14 two beers." Does that refresh your
15 memory as to how much beer you had while
16 you were at the Longhorn?
17 A. Somewhat.
18 Q. Do you remember also being asked the
19 question, "Two beers?" And your answer
20 was, "I don't know. I don't know. I
21 don't know what I had to drink." Do you
22 remember that?
23 A. I do now.
24 Q. Do you know what you had to drink that

Page 29

1 night at the Longhorn?
2 A. I don't.
3 Q. Then the question was asked of you, "Did
4 you have any Manhattans that night?" Do
5 you see that?
6 A. Yes.
7 Q. And your answer was, "I might have had
8 one. I don't know." Do you see that?
9 A. Yes.
10 Q. Is that your memory today that you might
11 have had one Manhattan but you don't
12 know?
13 MR. GILLIS: Objection.
14 A. Yes.
15 Q. So your memory is the same today as it
16 was back in June of 2004 when you were
17 deposed about how much you had to drink.
18 MR. GILLIS: Objection.
19 A. I don't know how much I had to drink.
20 Q. Do you know where you sat that evening?
21 A. I don't.
22 Q. Do you know the name of your server?
23 A. I don't.
24 Q. Did you know the names of any of the

Page 30

1 servers at the Longhorn that summer?
2 A. I see the name or they introduced
3 themselves.
4 Q. But you had no regular server.
5 A. No.
6 Q. Jeff had no regular server that you know
7 of.
8 A. Not that I recall.
9 Q. Jeff liked Jack Daniels Manhattans, is
10 that right?
11 MR. GILLIS: Objection.
12 A. I don't know.
13 Q. Did he drink Jack Daniels Manhattans
14 that evening?
15 A. Again I don't know. I know they were
16 being served.
17 Q. The Manhattans that were being served
18 were they on the rocks or straight up?
19 A. I don't know.
20 Q. Was there a way that Jeff typically
21 liked to have his Manhattan served?
22 A. Again I can't remember.
23 Q. On Page 93 of your deposition you were
24 asked a series of questions about the

Page 31

1 Manhattans. At Line 11 you were asked,
2 "So you don't know how many Jack
3 Daniels Manhattans were received to the
4 table, is that right?" Do you see
5 that?
6 A. Yes.
7 Q. And your answer was, "I don't." Do you
8 see that?
9 A. I do.
10 Q. Is that your memory today that you don't
11 know how many Jack Daniels Manhattans
12 were delivered to the table?
13 A. Correct.
14 Q. Then you were asked the question, "Were
15 the Manhattans that you do know of
16 served on the rocks or straight up?" Do
17 you see that?
18 A. I do.
19 Q. And your answer after some stuttering,
20 if you'll pardon my characterization,
21 was, "I think straight up, but -- I
22 think straight up." Do you see that?
23 A. I do.
24 Q. Is that your answer today that the

Page 32

1 Manhattans that were delivered to the
2 table were delivered straight up?
3 MR. GILLIS: Objection.
4 A. Again I can't remember.
5 Q. Then you were asked the question, "Is
6 that typically how Jeff liked the
7 Manhattans?" See that?
8 A. I do.
9 Q. Your answer was, "Yup." Do you see
10 that?
11 A. I do.
12 Q. Is that your memory today that that was
13 typically how Jeff liked the
14 Manhattans?
15 MR. GILLIS: Objection.
16 A. Again I don't have any memory.
17 Q. Do you have any memory today of how
18 Jeff, as of September 26, 2003, liked
19 his Manhattans, on the rocks or straight
20 up?
21 A. I don't know.
22 Q. Is your memory exhausted as to how Jeff
23 liked his Manhattans, on the rocks or
24 straight up?

1 MR. GILLIS: Objection.
2 Q. Do you have a memory of how he liked
3 them?
4 A. I don't.
5 Q. You have no memory of how they were
6 served to the table?
7 A. I don't know that today.
8 Q. It's your best memory you had one
9 Manhattan that night, is that right?
10 MR. GILLIS: Objection.
11 A. I don't know.
12 Q. You may have had no Manhattans that
13 night, is that right?
14 MR. GILLIS: Objection.
15 A. I don't know.
16 Q. You drove that night after you left the
17 Longhorn, is that right?
18 A. I don't know who drove. I don't
19 remember.
20 Q. Today you don't remember?
21 A. I don't.
22 Q. Do you remember testifying in the
23 criminal trial in Lowell?
24 A. I remember testifying.

1 Q. Did you testify in the criminal trial
2 that you drove?
3 A. I believe I did.
4 Q. Is there any question in your mind about
5 whether you drove that night after
6 leaving the Longhorn?
7 A. Again I believe I drove.
8 Q. My question to you is is there any doubt
9 in your mind about whether you drove
10 that night after leaving the Longhorn?
11 MR. GILLIS: Objection.
12 A. No.
13 Q. You know you drove, isn't that right?
14 MR. GILLIS: Objection.
15 A. I believe so.
16 Q. You know you drove.
17 MR. GILLIS: Objection. He
18 has answered five times. If you don't
19 like the answer that doesn't give you
20 the right to keep asking.
21 Q. You drove, isn't that right?
22 MR. GILLIS: Objection.
23 A. I believe so.
24 Q. You can't say yes or no to that

1 question?
2 MR. GILLIS: Objection.
3 A. Two and a half years ago.
4 Q. That was an especially vivid night in
5 your memory, isn't that right?
6 MR. GILLIS: Objection.
7 Q. Who drove from the Longhorn to wherever
8 you went next?
9 MR. GILLIS: Objection.
10 Asked and answered.
11 A. Again I believe it was myself. That's
12 what I've testified before.
13 Q. After the Longhorn where did you go?
14 A. There's a hotel right around the corner.
15 Q. How long did it take to get there?
16 A. Not very long. It's just over Route 2.
17 Q. While you were at the Longhorn was
18 anyone at your table exhibiting what you
19 took to be signs of intoxication?
20 A. Not that I recall.
21 Q. Have you since spoken to your brother
22 about whether he was drunk or not that
23 night?
24 A. Not that I recall.

1 Q. Has your brother told you he was drunk
2 that night at any point?
3 A. Not that I recall.
4 Q. Did Jeff order any Jack Daniels
5 Manhattans at the Longhorn that night?
6 A. I can't recall. I believe so.
7 Q. Was Jeff at the time of the service of
8 the last drink to the table under the
9 influence of intoxicating beverages?
10 A. Not that I recall.
11 Q. Was he loud that night?
12 A. Not that I recall.
13 Q. Was he somewhat loud that night?
14 A. Not that I recall.
15 Q. Do you remember being asked the question
16 at the bottom of Page 80, "Was he loud?"
17 Do you see that?
18 A. I do.
19 Q. Your answer was, "Well -- I think he was
20 somewhat loud but I don't know." Do you
21 see that?
22 A. I do.
23 Q. Does that refresh your memory about
24 whether Jeff was loud that night?

Page 37

1 A. No more so than any other time.
 2 Q. Jeff was just a loud guy, is that right?
 3 MR. GILLIS: Objection.
 4 A. I don't know.
 5 Q. What do you mean by no more so than any
 6 other time?
 7 A. It doesn't stand out in my head.
 8 Q. What doesn't stand out in your head?
 9 A. That he was loud that night.
 10 Q. Were there other times when he was loud?
 11 A. Not that I recall.
 12 Q. What do you mean no more so than any
 13 other time?
 14 A. You asked me if it refreshed my memory.
 15 I said not that I recall, no more so
 16 than any other time.
 17 Q. My question is was Jeff loud that night
 18 that you can recall?
 19 MR. GILLIS: Objection.
 20 A. No, not that I can recall at this time.
 21 Q. Did anyone who you understood to be an
 22 employee of the Longhorn come to the
 23 table at any point in time and ask your
 24 table to quiet down?

Page 38

1 A. Not that I recall.
 2 Q. Is there any question in your mind
 3 whether Jeff was intoxicated that night
 4 at the restaurant?
 5 MR. GILLIS: Objection. Do
 6 you understand the question?
 7 THE WITNESS: Will you say
 8 it one more time.
 9 Q. Is there any question in your mind he
 10 was intoxicated that night at the
 11 restaurant?
 12 A. Yes.
 13 Q. You're not sure whether he was
 14 intoxicated or not, is that right?
 15 MR. GILLIS: Objection.
 16 A. I'm not sure.
 17 Q. He had enough to drink to be intoxicated
 18 to your way of thinking, isn't that
 19 right?
 20 MR. GILLIS: Objection.
 21 A. I don't know.
 22 Q. You don't know what he had to drink?
 23 A. I don't.
 24 Q. Has anyone ever told you that there were

Page 39

1 seventeen Jack Daniels Manhattans served
 2 to your table that night?
 3 A. Not that I remember.
 4 Q. Has anyone ever told you how many Jack
 5 Daniels Manhattans were served to your
 6 table that night?
 7 A. I believe it was mentioned at the
 8 criminal trial but I don't know.
 9 Q. How many people were at the table that
 10 night?
 11 A. I think seven or eight.
 12 Q. Who were they?
 13 A. There was myself, my brother, Jeff and
 14 Jude and then three of my brother's
 15 friends.
 16 Q. Who were they?
 17 A. Todd and two of his friends from
 18 college.
 19 Q. Do you know their names?
 20 A. I don't.
 21 Q. So that's seven people, is that right?
 22 A. Yes.
 23 Q. Was Jude drinking alcoholic beverages to
 24 your memory that night?

Page 40

1 A. Not that I recall.
 2 Q. So six of you were drinking alcoholic
 3 beverages, is that correct?
 4 A. Yes.
 5 Q. Among the six of you do you know who
 6 drank the seventeen Jack Daniels
 7 Manhattans that were delivered to the
 8 table?
 9 MR. GILLIS: Objection.
 10 A. I don't.
 11 Q. Did you have more than one Jack Daniels
 12 Manhattan at the table that night?
 13 MR. GILLIS: Objection.
 14 A. I don't recall.
 15 Q. Did Jeff have more than one Jack Daniels
 16 Manhattan at the table that night?
 17 A. I don't recall.
 18 Q. How about your brother, did he have more
 19 than one?
 20 A. I don't recall.
 21 Q. Does your brother like beer?
 22 A. Does he or did he?
 23 Q. Did he.
 24 A. Yeah.

Page 41

1 Q. And is it accurate to say that you don't
2 know whether Jeff was drunk by the way
3 he appeared at the restaurant that
4 night?

5 MR. GILLIS: Objection.

6 A. I don't know.

7 Q. One way or the other, is that right?

8 A. That's correct.

9 Q. At the time you were served the last
10 drink you don't know one way or the
11 other whether he was drunk, is that
12 right?

13 MR. GILLIS: Objection.

14 A. That's right.

15 Q. Was Jeff exhibiting behavior that night
16 at the time of the service of the last
17 drink that was consistent with behavior
18 of his that you had seen on other
19 earlier occasions where he was
20 intoxicated?

21 MR. GILLIS: Objection.

22 A. I don't recall.

23 Q. You have seen Jeff intoxicated on other
24 occasions, isn't that right?

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1 A. I don't know.

2 Q. It's your best memory that you might
3 have had one Jack Daniels Manhattan at
4 the Longhorn that night?

5 MR. GILLIS: Objection.

6 A. I don't recall.

7 Q. I'm going to show you Page 93 of your
8 deposition where I asked you the
9 question, "Is that typically how Jeff
10 liked the Manhattans?" Your answer was
11 "Yup."

12 "Were the Manhattans
13 already mixed when they were delivered
14 to the table?" Your answer was, "You
15 mean already made? Yeah. Yeah."

16 "You don't remember having
17 any, is that right?" Your answer was,
18 "I might have had one. I might have
19 had one. I think I had one, but --" Do
20 you see that?

21 A. I do.

22 Q. Does that refresh your memory about
23 whether you had more than one Jack
24 Daniels Manhattan that night at the

Page 43

1 restaurant?

2 MR. GILLIS: Objection.

3 A. No.

4 Q. What is your best memory as to how many
5 Jack Daniels you had that night at the
6 restaurant?

7 A. I don't know.

8 Q. Had you had few enough Jack Daniels
9 Manhattans so that you felt comfortable
10 driving after you left the restaurant?

11 A. I believe so.

12 Q. While you were at the Longhorn do you
13 remember anyone saying to anybody else
14 at the table, "You've had too much to
15 drink" or words to that effect?

16 A. I don't recall.

17 Q. Do you have any memory of anyone saying
18 anything like that to Jeff?

19 A. I don't.

20 Q. Do you remember anyone saying that to
21 you?

22 A. I don't.

23 Q. To your way of thinking as of the time
24 you left the Longhorn had you had too

Page 44

1 much to drink?

2 A. No.

3 Q. How long were you at the Four Points?

4 A. I don't know. Not very long.

5 Q. Do you remember Jeff having a beer
6 there?

7 A. I believe so.

8 Q. Do you remember him having more than one
9 beer while he was there?

10 A. I don't recall.

11 Q. Do you remember Jeff smoking any pot
12 while he was there, marijuana?

13 A. I don't recall.

14 Q. Do you remember anyone smoking marijuana
15 at the hotel?

16 A. No.

17 Q. Was anyone smoking marijuana as far as
18 you knew at the hotel?

19 MR. GILLIS: Objection.

20 A. I don't know.

21 Q. By the time Jeff had had a beer at the
22 Four Points was he exhibiting any signs
23 of intoxication?

24 A. Not that I recall.

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1 Q. At some point in time did you all leave
 2 the Four Points?
 3 A. We did.
 4 Q. Where did you go?
 5 A. The Other Side.
 6 Q. On the drive from the Longhorn to the
 7 Four Points who was where in the truck?
 8 A. I don't recall.
 9 Q. Your best memory is that you drove.
 10 A. I believe so.
 11 Q. Is it your best memory, yes or no?
 12 MR. GILLIS: Objection.
 13 A. Yes.
 14 Q. Did I ask you where you next went after
 15 the Four Points?
 16 A. You did.
 17 Q. And you told me where, again?
 18 A. The Other Side.
 19 Q. And in what town is the Other Side?
 20 A. Leominster or Fitchburg.
 21 Q. Had you been there before?
 22 A. I believe I went there once.
 23 Q. Who drove from the Four Points to the
 24 Other Side?

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1 A. I believe I did.
 2 Q. Is that your best memory that you drove?
 3 A. Yes.
 4 Q. Do you know where people were arrayed in
 5 the vehicle at that time?
 6 A. I don't.
 7 Q. Was it Jeff's truck that you drove from
 8 the Longhorn to the Four Points?
 9 A. It was a rental.
 10 Q. That Jeff had had with him when you
 11 first met up with him that day?
 12 A. Yes.
 13 Q. Do you remember what color it was?
 14 A. I don't.
 15 Q. And was it that same rental truck that
 16 you drove from the Four Points to the
 17 Other Side?
 18 A. Yes.
 19 Q. Was Jude with you on both legs of this
 20 trip, that is from Longhorn to Four
 21 Points and Four Points to the Other
 22 Side?
 23 A. Yes.
 24 Q. And Jeff was in the truck as well on

Page 47

1 both legs of that trip, is that right?
 2 A. Yes.
 3 Q. Along with his rottweilers.
 4 A. Yes.
 5 Q. What were their names?
 6 A. Daisy and Ruby.
 7 Q. Do you have them now?
 8 A. I don't.
 9 Q. Did you have them at any point in time?
 10 A. I did.
 11 Q. Did your brother take them?
 12 A. No.
 13 Q. Did Jude take them?
 14 A. No.
 15 Q. What happened to Daisy and Ruby?
 16 A. Jude's brother took care of them.
 17 Q. Where are they today?
 18 A. They found either a home for them or a
 19 shelter.
 20 Q. How did you learn that?
 21 A. Dillon told me.
 22 Q. Jude's brother?
 23 A. Yes.
 24 Q. Have you spoken to Mrs. Southworth since

Page 48

1 September 26, 2003?
 2 A. Not that I recall.
 3 Q. How about Mister?
 4 A. Not that I recall.
 5 Q. How about Jeff?
 6 A. Once.
 7 Q. When did you speak to Jeff?
 8 A. I don't know. He called me randomly one
 9 day.
 10 Q. From prison?
 11 A. Yes.
 12 Q. Was he awaiting trial or had he been
 13 tried already?
 14 A. I think he was awaiting.
 15 Q. What did he say?
 16 A. Nothing really.
 17 Q. Did he talk about your upcoming
 18 testimony in the criminal trial?
 19 A. Not especially.
 20 Q. Tell me what you remember he said about
 21 your upcoming testimony in the criminal
 22 trial.
 23 MR. GILLIS: Objection.
 24 A. I don't remember talking about it.

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1 Q. What do you mean by "not especially"?
2 A. He said, "I'm going to trial soon."
3 Q. You knew that, didn't you?
4 A. Yes.
5 Q. Did he talk about what you were going to
6 testify to?
7 A. No.
8 Q. How long was that conversation?
9 A. Not very long.
10 Q. How did he sound, upbeat?
11 MR. GILLIS: Objection.
12 A. I don't know.
13 Q. On the trip from the Longhorn to the
14 Four Points was Jeff in the back with
15 the dogs?
16 A. No. I believe he was in the back from
17 the Four Points to the Other Side.
18 Q. Was he asleep at any point in time in
19 the back seat on the trip from the Four
20 Points to the Other Side?
21 MR. GILLIS: Objection.
22 A. Not that I recall.
23 Q. Did any of you go into the Other Side?
24 A. No.

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1 Q. Approximately how long did it take to
2 drive from the Four Points to the Other
3 Side?
4 A. Ten minutes.
5 Q. Why didn't you go into the Other Side?
6 A. We decided we didn't want to.
7 Q. Why?
8 MR. GILLIS: Objection.
9 A. It was getting late.
10 Q. So what was the conversation about going
11 into the Other Side?
12 A. It was, "Let's not go inside."
13 Q. Why?
14 MR. GILLIS: Objection.
15 A. It was getting late.
16 Q. Did the three of you decide you were
17 tired and didn't feel like going in?
18 MR. GILLIS: Objection.
19 A. I believe so.
20 Q. How long were you in the parking lot at
21 the Other Side?
22 A. Briefly.
23 Q. Was there anybody else in the truck from
24 the Four Points to the Other Side that

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1 you can recall?
2 A. No, not that I can recall.
3 Q. When you say briefly, are we talking
4 less than five minutes in the parking
5 lot?
6 A. Yes.
7 Q. And then where next did your group go?
8 A. We went to Littleton.
9 Q. Did Jeff have anything to drink that you
10 know of in the trip from the Four Points
11 to the Other Side?
12 A. Not that I know of.
13 Q. Did Jeff have anything to drink that you
14 know of in the trip from the Longhorn to
15 the Four Points?
16 A. Not that I know of.
17 Q. Where did you go in Littleton?
18 A. Back to get my vehicle.
19 Q. And the route that you traversed from
20 the Four Points to the Other Side if you
21 can tell us was what?
22 A. Route 12.
23 Q. Did you take what you thought was a
24 direct route from the Four Points to the

Page 52

1 Other Side?
2 A. I believe so.
3 Q. And then the route that you traversed
4 from the Other Side to Littleton was
5 what?
6 A. Probably back to Route 2 and down
7 Route 2.
8 Q. And it took twenty minutes to half an
9 hour to go from the Other Side to
10 Littleton, is that right?
11 A. Yes, I would say so.
12 Q. On the ride from the Other Side to
13 Littleton did you have any conversations
14 with Jeff about Jeff as to whether he
15 should just sleep in the truck?
16 A. I believe it came up and he said he was
17 fine.
18 Q. Do you remember telling him that he
19 should just sleep in the truck?
20 A. I don't remember the exact words.
21 Q. Do you remember being deposed and on
22 Page 118 you were asked the question,
23 "Had there been any arguments between
24 Jeff and you in the ride from the strip

Page 53

1 club to Littleton?" Do you see that?
 2 A. Yes.
 3 Q. Your answer was, "Um, I think I -- I --
 4 for some reason I remember telling him
 5 that he should just sleep in his truck."
 6 Do you see that?
 7 A. Yes.
 8 Q. Do you remember saying that to him?
 9 A. Not those exact words.
 10 Q. Do you remember in essence telling him
 11 that he should just sleep in the truck?
 12 A. I don't remember telling him that but I
 13 know it was discussed.
 14 Q. Between Jeff and you?
 15 A. Yes.
 16 Q. And the reason it was discussed was
 17 because to your way of thinking Jeff had
 18 had too much to drink that night, isn't
 19 that right?
 20 MR. GILLIS: Objection.
 21 A. Sorry, one more time.
 22 Q. The reason it was discussed was because
 23 to your way of thinking Jeff had had too
 24 much to drink that night, isn't that

Page 54

1 right?
 2 MR. GILLIS: Objection.
 3 A. It's more if you go out with somebody
 4 you ask them if they are all right.
 5 Q. After saying that you remembered telling
 6 him that he should just sleep in the
 7 truck do you remember being asked the
 8 question, "And that was because he'd had
 9 too much to drink, isn't that right?"
 10 Do you remember that?
 11 MR. GILLIS: Objection.
 12 A. I do now.
 13 Q. You see it here in your deposition.
 14 A. Yes.
 15 Q. And your answer was, "Yes, yes." Do you
 16 see that?
 17 A. I do.
 18 Q. And did you believe that night when you
 19 told him he should sleep in the truck
 20 that he had had too much to drink and
 21 should not drive?
 22 A. I don't recall.
 23 Q. Is your memory refreshed by what you see
 24 here on Page 118 of your deposition as

Page 55

1 to whether you told him that night that
 2 he should just sleep in the truck
 3 because to your way of thinking he had
 4 had too much to drink?
 5 MR. GILLIS: Objection.
 6 A. I said it there but I don't remember it.
 7 Q. Was your memory better of the events in
 8 June of 2004 than it is today?
 9 MR. GILLIS: Objection.
 10 A. It's a smaller time frame.
 11 Q. Was your memory better back then of the
 12 events than it is today?
 13 MR. GILLIS: Objection.
 14 A. Yes.
 15 Q. Do you have any reason to doubt the
 16 accuracy of your testimony on Page 118
 17 that you told him he should sleep in the
 18 truck because he had had too much to
 19 drink?
 20 MR. GILLIS: Objection.
 21 A. Say that one more time.
 22 Q. Do you have any reason to doubt the
 23 accuracy of your memory back in June of
 24 2004 that you told him he should sleep

Page 56

1 in the truck because he had had too much
 2 to drink?
 3 MR. GILLIS: Objection.
 4 MR. FARRAH: Could you read
 5 back that question, please, Ros.
 6 [Question read.]
 7 Q. Yes, no, or I don't understand the
 8 question?
 9 MR. GILLIS: Objection.
 10 A. I don't understand the question.
 11 Q. This transcript on Page 118 says you
 12 said at your deposition, of which this
 13 transcript, I believe, is an accurate
 14 recitation, you said the words, "I
 15 remember telling him that he should just
 16 sleep in his truck," isn't that right?
 17 Do you remember saying those words?
 18 MR. GILLIS: Objection.
 19 A. Not exactly.
 20 Q. Do you remember having a conversation
 21 with him about that he should just sleep
 22 in the truck?
 23 A. I remember it being discussed, yes.
 24 Q. And do you remember saying to him, "You

1 should just sleep in the truck," or
 2 words to that effect?
 3 A. Again I remember it being discussed.
 4 Q. What do you remember about the
 5 discussion, Mr. Espey?
 6 A. I asked him if he was all right to
 7 drive.
 8 Q. Because you thought he had had too much
 9 to drink, isn't that right?
 10 MR. GILLIS: Objection.
 11 A. That's what you do when you go out with
 12 somebody. You ask them if they are all
 13 right.
 14 Q. Well, if they've had too much to drink,
 15 isn't that right?
 16 MR. GILLIS: Objection.
 17 A. Not always.
 18 Q. In this case that night when you asked
 19 him if he was all right was it because
 20 you believed he had too much to drink?
 21 MR. GILLIS: Objection.
 22 A. I don't know.
 23 Q. You don't know? You're here under oath.
 24 A. I know. Again I don't know.

1 Q. Do you remember what you said to him
 2 back in June of 2004 as to why you said
 3 to him he should just sleep in his
 4 truck?
 5 A. I see it right there.
 6 Q. Why you said that to him back then was
 7 because, let me read it again, "Because
 8 he had too much to drink," isn't that
 9 right?
 10 MR. GILLIS: That's your
 11 testimony.
 12 Q. What was your answer to that question?
 13 A. I answered yes.
 14 Q. You answered truthfully yes, isn't that
 15 right, back in 2004?
 16 A. Yes. I was under oath.
 17 Q. And you are under oath today.
 18 A. Yes.
 19 Q. Is your memory refreshed that you had
 20 the conversation with him about just
 21 sleeping in his truck because you
 22 believed he had too much to drink?
 23 MR. GILLIS: Objection.
 24 Asked and answered about ten times.

1 A. I asked him if he was all right to
 2 drive.
 3 Q. Because you thought he had too much to
 4 drink, isn't that right?
 5 MR. GILLIS: Objection.
 6 A. Because I was a concerned friend.
 7 Q. And you were concerned because you
 8 thought he had had too much to drink,
 9 isn't that right?
 10 MR. GILLIS: Objection.
 11 Q. Isn't that right?
 12 A. I don't know what I thought then.
 13 Q. You know what you thought back in June
 14 of 2004.
 15 A. It's on the paper right there.
 16 Q. Do you adopt that?
 17 MR. GILLIS: Objection.
 18 A. I believe I did it out of being
 19 concerned.
 20 Q. Because you thought he had had too much
 21 to drink as you testified to in June of
 22 2004, isn't that right?
 23 MR. GILLIS: Objection. He
 24 never testified to that.

1 MR. FARRAH: Of course he
 2 testified to that.
 3 MR. GILLIS: He adopted your
 4 statement.
 5 MR. FARRAH: That's not
 6 testifying to it?
 7 MR. GILLIS: Objection to
 8 the question.
 9 Q. Did I speak to you before your
 10 deposition about anything you were going
 11 to testify to back in June of 2004 or
 12 any time before June of 2004, sir?
 13 A. Not that I recall.
 14 MR. GILLIS: Objection.
 15 Referring to Lines 13 and 14 it was your
 16 testimony as to why he did it and he
 17 just adopted your testimony.
 18 Q. What did Jude say that night about
 19 whether or not Mr. Southworth should
 20 sleep in the truck?
 21 MR. GILLIS: Objection.
 22 A. I don't know what Jude said.
 23 Q. Do you remember Jude being part of that
 24 conversation?

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1 A. I don't remember.
2 Q. What did Mr. Southworth say when you
3 told him he should just sleep in the
4 truck?
5 A. I don't remember.
6 Q. Did he say "Okay"?
7 A. Apparently not.
8 Q. Did he swear at you?
9 A. I don't remember.
10 Q. Were you afraid of him?
11 A. No.
12 Q. A little bit?
13 A. I wouldn't say so.
14 Q. Are you afraid of him now?
15 A. No.
16 Q. Are you sure?
17 A. Yes.
18 Q. Is it accurate to say that the reason
19 you didn't go into the strip club was
20 because Jeff was too drunk?
21 MR. GILLIS: Objection.
22 A. I don't recall.
23 Q. Do you remember what he said about going
24 into the strip club while you were in

1 with him, isn't that right?" That was
2 in your deposition on Page 119, Line 14.
3 Do you remember what your answer was?
4 A. I see it now.
5 Q. And the truth of the matter is you were
6 afraid of Jeff, isn't that right?
7 MR. GILLIS: Objection.
8 A. He's a big guy.
9 Q. Can you give me a "Yes, I was afraid of
10 Jeff because he is a big guy" as your
11 answer?
12 MR. GILLIS: Objection.
13 Read the whole answer.
14 Q. The truth of the matter is you were
15 afraid of Jeff, isn't that right?
16 MR. GILLIS: Objection.
17 A. Physically?
18 Q. Yes.
19 A. Yes.
20 Q. That wasn't so hard, was it, to say yes?
21 MR. GILLIS: Objection and
22 move to strike.
23 Q. And you were afraid of Jeff all the way
24 up through the time that you testified

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1 the parking lot?
2 A. I don't recall.
3 Q. At some point in time did Jeff become
4 adamant that he wanted to go home that
5 night?
6 A. I believe we all did.
7 Q. My question to you is at some point in
8 time did Jeff become adamant that he
9 wanted to go home that night?
10 MR. GILLIS: Objection.
11 A. I don't recall.
12 Q. Do you remember being asked that
13 question on Page 119, "And he was
14 adamant about that, is that right?" Do
15 you remember that?
16 A. I see it.
17 Q. The answer was, "Yeah, he did not want
18 to go," and that was to go into the
19 strip club, isn't that right?
20 MR. GILLIS: Objection.
21 Q. Is that right?
22 A. Yes.
23 Q. Do you remember being asked the
24 question, "And you weren't going to mess

1 at the criminal trial, isn't that right?
2 ?
3 MR. GILLIS: Objection.
4 A. I don't believe so.
5 Q. Did you testify truthfully at the
6 criminal trial?
7 A. Yes.
8 Q. Did you give it your best effort at the
9 criminal trial?
10 A. Yes.
11 Q. Did you give it your best effort at your
12 deposition in June of 2004?
13 A. Yes.
14 Q. And you are doing that today, is that
15 right?
16 A. Yes.
17 Q. Jeff ran over your ankle backing out of
18 the parking lot, is that right?
19 A. Correct.
20 Q. And you had to go to the hospital, isn't
21 that right?
22 A. Correct.
23 Q. And when you went to the hospital you
24 told people you injured yourself dirt

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1 biking, is that correct?
2 A. Right.
3 Q. Why did you lie?
4 A. I wasn't sure what the insurance was
5 going to cover.
6 Q. You wanted to be sure the insurance
7 covered you, is that right?
8 A. I wasn't sure about insurance. I really
9 didn't want to get involved.
10 Q. So you told a lie, is that right?
11 MR. GILLIS: Objection.
12 Q. That was a lie, wasn't it?
13 A. That was, yes.
14 Q. And that's the only lie you've ever told
15 about what happened with Jeff Southworth
16 that night, is that right?
17 A. Correct.
18 Q. Did Jeff say anything to you as he ran
19 over your ankle that night?
20 A. Not that I recall.
21 Q. Which ankle was it?
22 A. My right.
23 Q. And how much time elapsed from when you
24 pulled into the parking lot at your

1 A. I don't know.
2 Q. What was in the bed of his truck?
3 A. Dirt bikes and dirt bike gear.
4 Q. What of yours was in the bed of his
5 truck that you had to retrieve that
6 night?
7 A. I had a helmet and some other protective
8 equipment and Jude had a bunch of
9 equipment.
10 Q. What was the other protective equipment
11 that you had besides the helmet?
12 A. Knee pads, chest protector, different
13 clothing.
14 Q. Were they in a duffel bag or something
15 like a duffel bag?
16 A. Yes.
17 Q. So what you had to retrieve from the
18 truck was your helmet and duffel bag, is
19 that right?
20 A. I believe we were getting Jude's stuff.
21 Q. I just want to know what you had to
22 retrieve from the truck. Helmet and
23 duffel bag?
24 A. I believe so.

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1 grandmother's apartment complex, the
2 Pond Side, until Jeff ran over your
3 ankle?
4 A. I don't recall. Not a long time,
5 though.
6 Q. What happened in the parking lot prior
7 to the time that he ran over your ankle?
8 A. We unloaded our dirt bike gear and he
9 started backing out.
10 Q. Did you give Jeff the keys to the truck
11 so he could drive away?
12 A. I don't recall.
13 Q. Did you leave the keys in the ignition
14 and get out the driver's seat?
15 A. I don't recall.
16 Q. What were you doing when he ran over
17 your ankle?
18 A. I believe I was getting some stuff out
19 of the bed of the truck.
20 Q. You had not yet retrieved all of
21 whatever it was you had put in the bed
22 of his truck before he ran over your
23 ankle, is that right?
24 MR. GILLIS: Objection.

1 Q. Your cooler too?
2 A. I don't recall.
3 Q. Where was the cooler during the trip
4 from Longhorn to the Four Points?
5 A. I believe it was in the bed.
6 Q. Not where the seats are but in the back
7 where the bikes were, is that right?
8 A. I believe so.
9 Q. And Jude had to retrieve what from the
10 truck at Littleton?
11 A. Helmet and duffel bag.
12 Q. Same as you.
13 A. Correct.
14 Q. Is it accurate to say that you could
15 carry the helmet in one hand and the
16 duffel bag in the other hand or over the
17 other shoulder?
18 A. Yes.
19 Q. You didn't need to make two trips to
20 carry the helmet and the duffel bag, is
21 that right?
22 A. Not that I recall.
23 Q. Is that, "No, we didn't need to make two
24 trips"?

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1 A. Not that I recall.
2 Q. And Jeff on the trip from the Other Side
3 to the parking lot in Littleton was in
4 the second row of seats, the back seat,
5 is that right?
6 A. I don't recall.
7 Q. Wasn't he in back there with his dogs?
8 A. He was at some point.
9 Q. Do you have any belief that he changed
10 seats from where he was in the trip from
11 the Four Points to the Other Side in the
12 trip from the Other Side to Littleton?
13 A. I don't believe so.
14 Q. How much time elapsed from when you got
15 out of the truck before Jeff ran over
16 your ankle?
17 A. A couple of minutes.
18 Q. Was there any discussion that went on
19 during that couple of minutes?
20 A. I believe I asked him if he was all
21 right to drive and he said yes.
22 Q. How many times up to that point had you
23 asked him if he was all right to drive?
24 A. I believe only once.

1 Q. And that's when you had the conversation
2 about should he sleep in the truck or
3 not.
4 A. I believe so.
5 Q. Jeff is bigger than you.
6 A. Yes.
7 Q. How much bigger than you is he?
8 A. I was about 180 at the time. He was
9 like 220, 230.
10 Q. You had seen him in fights before, is
11 that right?
12 A. Yes.
13 Q. And you had seen him beat up people
14 before, is that right?
15 A. It's not like a big long fight.
16 Q. It was quick, he beat them up quick, is
17 that right?
18 MR. GILLIS: Objection.
19 A. No. I've seen him throw a punch or two.
20 Q. Did he ever throw a punch at you?
21 A. No.
22 Q. You didn't want him to throw a punch at
23 you, is that right?
24 MR. GILLIS: Objection.

1 Q. After he ran over your ankle did you say
2 anything to him?
3 A. Not that I recall.
4 Q. Did you say anything at all after he ran
5 over your ankle that you can recall?
6 A. I probably cursed a little bit.
7 Q. Do you remember cursing a little bit?
8 A. I just got run over.
9 Q. I'm going to show you a document and ask
10 you if you recognize your signature at
11 the bottom.
12 A. I do.
13 Q. And that's a document you gave the
14 police, is that right?
15 A. Yes.
16 Q. Is that your handwriting?
17 A. It is.
18 Q. And do you agree with the date of
19 November 2, 2003 as on or about the date
20 you made the document?
21 A. I believe so.
22 [Handwritten document by
23 Scott Espey marked Scott
24 Espey Exhibit No. 1 for

1 Identification.]
2 Q. The police asked you to make this
3 document, is that right?
4 A. Correct.
5 Q. At your house or someplace else?
6 A. My house.
7 Q. Was your brother with you when you made
8 this document?
9 A. I don't believe so.
10 Q. How many police officers came to see
11 you?
12 A. One.
13 Q. I apologize because a bit of it has been
14 cut off but at the bottom it says here
15 on the third line down, "We couldn't
16 help so we returned home." Then it
17 says, "At the" something "we all ordered
18 beer and Manhattans." Do you see that?
19 A. I do.
20 Q. What does that sentence read?
21 A. It says "At the Longhorn," I believe,
22 "we all ordered beer and Manhattans."
23 Q. Is that true that at the Longhorn you
24 all ordered beer and Manhattans?

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1 MR. GILLIS: Objection.
 2 Q. That's what you believed at the time?
 3 A. Yes.
 4 Q. Did you believe the persons who were
 5 drinking alcoholic beverages at the
 6 table, the six people, were drinking
 7 beers as well as Manhattans?
 8 MR. GILLIS: Objection.
 9 A. That's what I believed then.
 10 Q. That your memory was better two months
 11 after the accident than it is today
 12 would you agree with me?
 13 A. I would agree.
 14 Q. What happened next after he ran over
 15 you?
 16 A. I got up and went to my truck and
 17 realized I didn't have my keys to the
 18 vehicle.
 19 Q. What did you do at that point?
 20 A. We tried contacting him.
 21 Q. By cell phone?
 22 A. Correct.
 23 Q. Did you speak to him?
 24 A. One of us did.

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1 Q. Do you remember what was said to him?
 2 A. One of us said, "We're locked out of
 3 Scott's vehicle. You just ran over his
 4 ankle."
 5 Q. What did he say?
 6 A. I think he kind of questioned it at
 7 first.
 8 Q. Really?
 9 A. I believe so.
 10 Q. Do you remember what he said?
 11 A. I don't.
 12 Q. You took it to be disbelief on his part
 13 that he could actually have done that,
 14 is that right?
 15 MR. GILLIS: Objection.
 16 A. Again I don't recall.
 17 Q. You just testified he questioned it.
 18 What did you mean by that?
 19 MR. GILLIS: Objection.
 20 A. It was more surprise than disbelief.
 21 Q. How long after he ran over your ankle
 22 was it that you had this conversation?
 23 A. Not long at all.
 24 Q. Less than five minutes?

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1 A. Yes.
 2 Q. Did he tell you where he was when you
 3 had that conversation?
 4 A. I believe he said he was on 495.
 5 Q. Did he tell you what he would do in that
 6 conversation?
 7 MR. GILLIS: Objection.
 8 A. Eventually he said he was turning
 9 around.
 10 Q. To bring back the keys as far as you
 11 know.
 12 A. As far as I know.
 13 Q. When you say eventually what do you
 14 mean?
 15 A. For some reason I believe there was a
 16 string of calls back and forth.
 17 Q. Initially.
 18 A. Initially, yes.
 19 Q. What do you remember was said during
 20 those calls back and forth?
 21 MR. GILLIS: Objection.
 22 A. That we were locked out and I had a
 23 broken ankle.
 24 Q. Do you remember what he said in response

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1 other than disbelief?
 2 A. I don't know what he said.
 3 Q. Do you know why it took a string of
 4 calls for him to agree to come back with
 5 the keys?
 6 A. I believe there was cell phone reception
 7 or something.
 8 Q. At some point in time did you come to
 9 understand that he was heading back with
 10 the keys?
 11 A. I did.
 12 Q. Did he come back with the keys?
 13 A. No.
 14 Q. At some point in time did you take some
 15 action to be able to drive your truck?
 16 A. We did.
 17 Q. What did you do?
 18 A. I had a spare key in the truck so Jude
 19 knocked out a rear window. I told him
 20 to.
 21 Q. He broke the window, is that right?
 22 A. Yes.
 23 Q. How long did you wait for him to come
 24 back before you decided it would be

1 better to knock out the window?
 2 A. I don't know. A little while.
 3 Q. Ten minutes, fifteen minutes?
 4 A. I was in a lot of pain.
 5 Q. Then after you knocked out the window
 6 did you ever again speak to Jeff
 7 Southworth?
 8 A. Not for a long time.
 9 Q. Finally he called you on the cell phone
 10 at night?
 11 A. No. After we had waited for a while he
 12 called and said he was in an accident.
 13 Q. Then you knocked out the window.
 14 A. Yes.
 15 Q. How much time elapsed between the last
 16 of the calls to confirm that he was
 17 going to come back with the keys until
 18 he called you and said, "I'm in an
 19 accident"?
 20 A. I don't know. Not a long time.
 21 Q. What did he say about the accident?
 22 A. He just said he was in an accident.
 23 Q. Did he say where?
 24 A. I don't remember.

1 Q. Did he say he needed help?
 2 A. I believe so, yes.
 3 Q. Did you ask him where he was?
 4 A. I don't know if I asked or if he said or
 5 if we just knew he was on 495.
 6 Q. And the question is, "Do you remember
 7 the conversation you had with him when
 8 he told you he had been in an accident?"
 9 Your answer was, "He told me he was in
 10 an accident and he needed help." Do you
 11 see that?
 12 A. I do.
 13 Q. And that is in accordance with your
 14 memory of what happened that night, is
 15 that right?
 16 A. Yes.
 17 Q. And then the question was, "What else
 18 did he say?" "That was it, I believe."
 19 "What did you say to him?" "I said -- I
 20 believe I asked him where he was. He
 21 said 495." Do you remember that?
 22 A. I do now.
 23 Q. Does that accord with your memory of the
 24 conversation you had with him that

1 night?
 2 A. Yes.
 3 Q. Did you have any more conversation with
 4 him in that phone call about the
 5 accident other than what is in your
 6 deposition and you have adopted today?
 7 MR. GILLIS: Objection.
 8 A. Not that I recall.
 9 Q. After that phone call and the back
 10 window was broken in the truck and you
 11 grabbed the keys did you try to find
 12 him?
 13 MR. GILLIS: Objection.
 14 A. Yes.
 15 Q. Tell me where you went, what you did,
 16 what you saw.
 17 A. We just went up 495 and saw him. It was
 18 a pretty bad accident.
 19 Q. You went up 495 northbound initially, is
 20 that right?
 21 A. Correct.
 22 Q. Why did you head north on 495?
 23 A. Because he lived north of Middleton.
 24 Q. Was that the direction you believed he

1 was headed in?
 2 A. Yes.
 3 Q. As you were proceeding northbound on 495
 4 did you see this pretty bad accident
 5 that you talked about a few moments ago?
 6 MR. GILLIS: Objection.
 7 A. We saw emergency vehicles.
 8 Q. Were they northbound on 495?
 9 A. Southbound.
 10 Q. Can you tell me the approximate location
 11 of where you saw the emergency vehicles
 12 southbound on 495?
 13 A. Chelmsford and Westford.
 14 Q. As you were traveling northbound on 495
 15 did you see these emergency vehicles on
 16 the southbound side?
 17 A. I did.
 18 Q. What did you do, if anything?
 19 A. First we didn't believe it was his
 20 accident so we kept going and we didn't
 21 see anything else so we turned around
 22 and drove back.
 23 Q. Why didn't you believe it was his
 24 accident?

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1 A. It was a pretty bad accident scene.
2 Q. Describe for me what you remember about
3 that accident.
4 A. Police cars and ambulances.
5 Q. Fire trucks?
6 A. Maybe. I don't recall. A lot of
7 emergency vehicles.
8 Q. You saw this from the northbound lane,
9 is that right?
10 A. Correct.
11 Q. As you kept going southbound you didn't
12 see any what appeared to be accident
13 scenes, is that right?
14 A. That's correct.
15 Q. So you turned around and then had an
16 opportunity to see from the southbound
17 lane of travel the accident scene, is
18 that right?
19 MR. GILLIS: Objection.
20 A. We went by it.
21 Q. Tell me what you saw.
22 A. We saw a lot of emergency vehicles,
23 firemen, EMTs, police officers.
24 Q. Ambulances?

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1 A. Yes.
2 Q. Did you see Mr. Southworth anywhere?
3 A. I didn't.
4 Q. Did you see his car anywhere?
5 A. I didn't.
6 Q. Did you see any non-official vehicle,
7 any cars?
8 A. Not that I recall.
9 Q. Any evidence of any vehicles you thought
10 had been in the accident?
11 A. Not that I recall.
12 Q. What did you do after you traveled past
13 the accident scene?
14 A. Went home.
15 Q. Did you try to call Mr. Southworth at
16 all from the time that he told you he
17 was in an accident until you went home?
18 A. I believe I tried calling him later but
19 there was no answer.
20 Q. Is it accurate to say that as of the
21 summer of 2003 Jeff Southworth was your
22 friend?
23 A. Yes.
24 Q. Did you own a dirt bike as of the summer

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1 of 2003?
2 A. I did not.
3 Q. And was Jeff letting you use one of his
4 dirt bikes that summer?
5 A. He was.
6 Q. And had Jeff and you talked about buying
7 the dirt bike from him?
8 A. It was discussed.
9 Q. Was that your hope that summer that you
10 could buy the dirt bike from Jeff?
11 A. We talked about it. I don't know if it
12 was going to happen or not.
13 Q. You wanted it to happen, is that right?
14 A. Yes.
15 Q. Is it accurate to say that you did not
16 want any testimony you gave in any
17 proceeding to hurt your friend Jeff
18 Southworth, is that accurate to say?
19 MR. GILLIS: Objection.
20 A. No.
21 Q. What is inaccurate about that statement?
22 A. I'm not going to hurt myself for him.
23 Q. What do you mean by that?
24 A. You say you don't want my testimony to

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1 hurt him. I'm not going to sit here
2 under oath and say something that is not
3 the truth.
4 Q. Did you speak to any police officers
5 about this night?
6 A. Yes.
7 Q. How many times did you speak to police
8 officers about this night?
9 A. Just once.
10 Q. Do you know who you spoke to?
11 A. A State Trooper.
12 Q. Did you speak to any prosecutors about
13 testifying in the criminal case?
14 A. I was subpoenaed to the Grand Jury in
15 the criminal case.
16 Q. You testified in the Grand Jury?
17 A. Yes.
18 Q. You testified truthfully in the Grand
19 Jury to the best you recall?
20 A. Yes.
21 Q. Then you testified at trial, is that
22 right?
23 A. That's right.
24 Q. You testified truthfully at the trial?

1 A. I did.
2 Q. And you have testified truthfully here
3 today.
4 A. Yes.
5 Q. And you testified truthfully in June of
6 2004, is that right?
7 A. I did.
8 Q. Did you ever speak to any attorneys you
9 understood were representing Jeff
10 Southworth?
11 A. Just that one day in June.
12 Q. Did you ever speak to anyone you
13 understood was Jeff's criminal lawyer?
14 A. I was questioned by him at the criminal
15 case.
16 Q. Other than being examined by him during
17 the criminal trial did you ever speak to
18 him?
19 A. No, not that I recall.
20 Q. Did you ever speak to any investigators
21 that you understood were working for
22 Jeff's lawyers?
23 A. I was contacted by them.
24 Q. Who contacted you?

1 Q. He identified himself as a private
2 investigator, is that right?
3 A. Yes.
4 Q. How did he happen to come to your house?
5 A. He knocked on the door and that was it.
6 Q. Had he called in advance to let you know
7 he was coming?
8 A. No.
9 Q. Had he spoken to your mother or your
10 father to let you know?
11 A. No.
12 Q. About a week ago this happened, is that
13 right?
14 A. Yes. Last Monday.
15 Q. What time of day or night was it he
16 came?
17 A. The middle of the day.
18 Q. Without warning?
19 MR. GILLIS: Objection.
20 A. Yes.
21 Q. What did he look like?
22 A. Middle age.
23 Q. What color hair?
24 A. Gray.

1 A. I don't know what his name was.
2 Q. Did he give you a card?
3 A. He didn't.
4 Q. Did you meet with him?
5 A. He called on my cell phone.
6 Q. What did he say to you?
7 A. He asked me a few questions and I didn't
8 really want to talk to him.
9 Q. Why was that?
10 A. I didn't know who he was.
11 Q. He told you who he was, didn't he?
12 A. Yes. He called me randomly on the cell
13 phone and said, "I'm so-and-so."
14 Q. Did he want to meet with you?
15 A. I don't believe so.
16 Q. Have you at any time spoken to any
17 persons you understand to be
18 investigators about this incident?
19 A. Yes.
20 Q. Who have you spoken to?
21 A. Somebody came to my house a week or two
22 ago.
23 Q. Mr. Dinatale?
24 A. I don't know his name.

1 Q. Short or tall?
2 A. Average size.
3 Q. Did he give you a card?
4 A. Yes.
5 Q. Do you have it with you?
6 A. I don't think so.
7 Q. Will you check?
8 [Short pause.]
9 THE WITNESS: I don't have
10 it.
11 Q. How long were you with him that day?
12 A. Not long, ten minutes.
13 Q. Did you invite him into the house?
14 A. No.
15 Q. Where did you have the conversation?
16 A. Right at the front door.
17 Q. Who else was present?
18 A. Myself and him.
19 Q. What did he say to you?
20 A. He gave me my transcripts and that was
21 about it.
22 Q. Which transcripts did he give you?
23 A. From when I was here last June.
24 Q. You had that transcript already, didn't

1 you?
2 A. Somewhere at my house.
3 Q. You said he gave you your transcripts.
4 A. He gave me my transcript and my
5 brother's transcript.
6 Q. Both of you.
7 A. Yes.
8 Q. Did he say, "This other transcript is
9 for your brother"?
10 A. Yes.
11 Q. You hadn't contacted him to come down
12 with those transcripts, had you?
13 A. No.
14 Q. And you hadn't contacted anyone to have
15 someone like this fellow come down and
16 bring the transcripts to you, is that
17 right?
18 A. That's right.
19 Q. Has Mr. Gillis's office been in touch
20 with you prior to today?
21 A. No.
22 Q. No one from Mr. Gillis's office got in
23 touch with you prior to today, is that
24 right?

1 A. That's correct.
2 Q. This fellow showed up at your door with
3 two transcripts, is that right?
4 A. Yes.
5 Q. And a business card.
6 A. Yes.
7 Q. But you can't now find the card, is that
8 right?
9 A. I don't have it with me, no.
10 Q. You talked to him for about ten minutes,
11 is that right?
12 A. Yes.
13 Q. What did he say and what did you say?
14 A. He asked me my name and I identified
15 myself. He said, "Basically you're
16 going to have a deposition next week"
17 and I confirmed that. I asked him what
18 the procedure is, if I needed
19 representation and what happens if I
20 don't show, rescheduling, stuff like
21 that.
22 Q. He identified himself as who?
23 A. I can't remember his name. He was a
24 private investigator.

1 Q. Working for Rare Hospitality?
2 A. Essentially, yes, I believe so.
3 Q. Did he mention Mr. Gillis's law firm's
4 name?
5 A. He said Mr. Gillis.
6 Q. From the day you were born until today
7 had you ever spoken to Mr. Gillis?
8 A. No.
9 Q. You had never met him, is that right?
10 A. That's correct.
11 Q. From the day you were born until today
12 other than this fellow who came to your
13 house last Monday had you ever spoken to
14 anyone you understood was working on Mr.
15 Gillis's behalf?
16 A. No.
17 Q. Or on the behalf of Mr. Gillis's
18 clients?
19 A. No.
20 Q. You asked him about the procedure for
21 the deposition.
22 A. Somewhat, yes.
23 Q. Did you trust this person?
24 A. No more than any other person that shows

1 up at your door.
2 Q. Why were you asking him about the
3 procedure if you didn't trust him?
4 A. He had a transcript. He had a card.
5 Q. So you trusted him.
6 MR. GILLIS: Objection.
7 A. I asked him for his input on the
8 situation.
9 Q. Why did you ask him for his input on the
10 situation?
11 A. Because he seemed to be a part of the
12 situation.
13 Q. You understood that he was working for
14 one side in this case, isn't that right?
15 A. That's right.
16 Q. And did you believe when you asked him
17 for his input into the situation that he
18 would answer your request with input
19 that was favorable to his side of the
20 case?
21 A. It was more what happens if I don't show
22 up? Is this something that can be
23 rescheduled, and that was about it.
24 Q. What other input did you ask him for?

1 A. That's it.
2 Q. Did you discuss with him at all other
3 than what you have just told me your
4 testimony today?
5 A. No, I did not.
6 Q. Did you discuss with him at all the
7 events of the night of September 26,
8 2003 at the Longhorn?
9 A. I did not.
10 Q. You testified earlier today that you are
11 not even sure whether you had finished
12 the beer that you ordered at the bar.
13 Do you recall that testimony?
14 MR. GILLIS: Objection.
15 A. I do.
16 Q. And what I want to know is did you
17 discuss at all with this fellow who
18 showed up on Monday at your house that
19 issue?
20 A. No.
21 Q. When is the first time you told anyone
22 that you are not sure whether you
23 finished the beer that you had at the
24 bar?

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1 A. That I was only there a few minutes at
2 the bar?
3 Q. Yes.
4 A. I don't, no.
5 Q. That's another guess, isn't it, that you
6 probably told the Grand Jury the first
7 time that you were only at the bar for a
8 few minutes?
9 A. I would say that's an estimation.
10 Q. A guess.
11 MR. GILLIS: Objection.
12 Asked and answered.
13 A. An estimation. I don't know.
14 Q. Do you have a memory of what you told
15 the Grand Jury about how long you were
16 at the bar?
17 A. No.
18 Q. Have you ever seen your Grand Jury
19 transcript?
20 A. I know it was presented to me at the
21 criminal trial.
22 Q. Who presented it to you?
23 A. I think the D.A. I don't know.
24 Q. Do you have a memory today that you

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1 MR. GILLIS: Objection.
2 A. Probably when I testified here last
3 summer.
4 Q. Did you review your testimony to see if
5 that was the case?
6 A. I didn't.
7 Q. You are just guessing, is that right,
8 when you answer the question that way?
9 A. I told you the truth then. I'm telling
10 you the truth now.
11 Q. You also testified today about how long
12 you were at the bar, that it might have
13 been just a few minutes you were at the
14 bar. Do you remember that testimony?
15 A. Yes.
16 Q. Do you remember discussion that with the
17 fellow who showed up at your house?
18 A. No.
19 Q. When is the first time you told anybody
20 that you might have been at the bar only
21 a few minutes that night?
22 A. Probably at the Grand Jury.
23 Q. Do you have any memory of telling that
24 to the Grand Jury?

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1 testified to the Grand Jury that you
2 were only at the bar for a few minutes
3 before you were seated at the table?
4 A. Yes.
5 Q. You also have a memory that you
6 testified in June of 2004 that you were
7 seated at the bar for approximately half
8 an hour before you went to the table.
9 MR. GILLIS: Objection.
10 A. A few minutes.
11 Q. Half an hour? Is that what you meant
12 by a few minutes?
13 A. I said twenty minutes earlier to that.
14 I said a few minutes. You said, "How
15 long?" I said fifteen or twenty and in
16 here it says a half hour.
17 Q. What does a few minutes mean to you?
18 A. Twenty minutes, twenty-five minutes,
19 half hour.
20 Q. And that's what you meant when you told
21 the Grand Jury you were at the bar for a
22 few minutes?
23 A. Yes.
24 Q. And is it your testimony that after dirt

1 biking for a few hours that you are not
 2 even sure whether you finished one beer
 3 during the fifteen, twenty to thirty
 4 minute time that you have now admitted
 5 you were at the bar before you were
 6 seated at the table?
 7 MR. GILLIS: Objection.
 8 A. I don't know how much I had to drink.
 9 Q. And that's because you were drunk that
 10 night, isn't that right?
 11 MR. GILLIS: Objection.
 12 A. I don't think so.
 13 Q. But you're not sure, are you?
 14 A. I was never given a sobriety test but I
 15 don't think I was.
 16 Q. You are not sure at the time you were
 17 served your last drink at the Longhorn
 18 Steakhouse whether or not you were under
 19 the influence of intoxicating alcohol,
 20 isn't that right?
 21 MR. GILLIS: Objection.
 22 A. I had a few drinks.
 23 Q. You were feeling good, is that right?
 24 MR. GILLIS: Objection.

1 A. I didn't say that.
 2 Q. But were you?
 3 MR. GILLIS: Objection.
 4 A. I had a beer or two. I couldn't tell
 5 you.
 6 Q. But were you feeling good at the time
 7 you were served your last drink at the
 8 Longhorn?
 9 MR. GILLIS: Objection.
 10 A. I can't remember.
 11 Q. Have you told me everything that you can
 12 remember about the conversation that you
 13 had with Mr. Dinatale at your house last
 14 Monday?
 15 A. I did.
 16 Q. Have you described everything that Mr.
 17 Dinatale gave to you during that evening
 18 to the best of your ability?
 19 A. I have.
 20 Q. That was his business card, your
 21 transcript from the Superior Court case,
 22 and your brother's transcript from the
 23 Superior Court case.
 24 MR. GILLIS: Objection.

1 A. It was from this deposition.
 2 Q. Did Mr. Dinatale give you anything else
 3 that day?
 4 A. Not that I know of.
 5 Q. Did you take any notes of the meeting
 6 with Mr. Dinatale?
 7 A. I did not.
 8 Q. Did he take any notes of the meeting
 9 with you?
 10 A. He did not.
 11 Q. That you know of, is that right?
 12 A. Not that I know of.
 13 Q. He didn't take any tape recording?
 14 A. Not that I know of.
 15 Q. Did he ask your permission to
 16 tape-record you?
 17 A. No.
 18 Q. Was that the first person you ever met
 19 with that you understood to be acting on
 20 behalf of Rare Hospitality?
 21 A. Yes.
 22 Q. Did you ever meet with an attorney from
 23 the law firm of Campbell, Campbell &
 24 Edwards?

1 A. Not that I know of.
 2 Q. Did you ever talk to an attorney from
 3 the law firm of Campbell, Campbell &
 4 Edwards?
 5 A. Unless it was in court or here not that
 6 I know of.
 7 Q. Have you since last Monday spoken to
 8 Mr. Dinatale?
 9 A. No.
 10 Q. Have you since then spoken to anyone
 11 that you understood was working for him?
 12 A. No.
 13 Q. Or from his agency or office?
 14 A. Not that I know of.
 15 Q. How did you leave it with Mr. Dinatale?
 16 MR. GILLIS: Objection.
 17 Q. Any threat to do anything else?
 18 MR. GILLIS: Objection.
 19 A. No.
 20 Q. Did he give you any suggestions about
 21 how to testify?
 22 A. No.
 23 Q. Did he tell you to tell the truth?
 24 A. Yes.

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1 Q. Did he need to tell you to tell the
 2 truth?
 3 MR. GILLIS: Objection.
 4 A. No.
 5 Q. What else did he say to you that you
 6 haven't told us?
 7 A. That's it.
 8 Q. Did he talk about how you were an
 9 important witness in the case?
 10 A. No.
 11 Q. Are you sure?
 12 A. I'm sure.
 13 MR. FARRAH: I don't have
 14 any more questions.
 15 CROSS-EXAMINATION
 16 BY MR. GILLIS
 17 Q. Mr. Espey, my name is Michael Gillis and
 18 I am representing Longhorn Steakhouse.
 19 Longhorn, just so you know, is the same
 20 company that Mr. Farrah has been
 21 referring to as Rare Hospitality.
 22 A. Okay.
 23 Q. Prior to you meeting with Mr. Dinatale
 24 you gave a deposition to Mr. Farrah, is

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1 that correct?
 2 A. Correct.
 3 Q. Nobody from Rare Hospitality or Longhorn
 4 was present there, correct?
 5 A. Correct.
 6 Q. No one had the opportunity to ask you
 7 questions, is that correct?
 8 A. From your client?
 9 Q. Anybody from Longhorn Steakhouse.
 10 A. No.
 11 Q. They weren't invited to that deposition
 12 that you know of, correct?
 13 A. Not that I know of.
 14 Q. Between that deposition and the time you
 15 met with Mr. Dinatale did you give any
 16 testimony to the Grand Jury?
 17 A. Yes.
 18 Q. And you told the truth as best you
 19 could, correct?
 20 A. Correct.
 21 Q. There was no one from Mr. Farrah's
 22 office present for that, correct?
 23 A. Correct.
 24 Q. And there was no one from our office

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1 there, correct?
 2 A. Correct.
 3 Q. That was before you met with any
 4 investigator in this case, correct, from
 5 either Mr. Farrah's office or my office.
 6 A. Correct.
 7 Q. The only investigator you met was
 8 Mr. Southworth's, correct?
 9 A. No, the State Trooper.
 10 Q. And at that time when you were asked
 11 questions at the Grand Jury you
 12 testified that Mr. Southworth was not
 13 intoxicated at the Longhorn, correct?
 14 MR. FARRAH: Objection.
 15 A. I don't know if he was or was not.
 16 Q. Do you remember that specific question
 17 being asked of you in the Grand Jury?
 18 MR. FARRAH: Objection.
 19 A. I don't recall. I'm sure it was
 20 probably asked, though.
 21 Q. Do you remember any of the specific
 22 questions you were asked at the Grand
 23 Jury?
 24 A. No.

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1 Q. So anything that you testified to today
 2 as to the Grand Jury would be guesses on
 3 your part, correct?
 4 A. I'm trying the best I can.
 5 Q. But it would be a guess, correct?
 6 MR. FARRAH: Objection.
 7 A. What I said then is probably more
 8 accurate than now.
 9 Q. For purposes of your testimony it has
 10 been a long period of time since this
 11 accident occurred, correct?
 12 A. Correct.
 13 Q. Is it fair to say over time you remember
 14 less about this incident, is that fair
 15 to say?
 16 A. I would say so.
 17 Q. And would you say that your Grand Jury
 18 testimony was more accurate than what
 19 you might be testifying to today?
 20 MR. FARRAH: Objection.
 21 A. Probably.
 22 Q. Is that because of the passage of time?
 23 A. Yes.
 24 Q. And the same is true with your statement

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1 to the State Police shortly after the
 2 accident.
 3 MR. FARRAH: Objection.
 4 A. Correct.
 5 Q. That was two months after the accident
 6 or less.
 7 A. November, whatever it was.
 8 Q. Whatever number of weeks from
 9 September 26, 2003 to November 2, 2003
 10 that's how close it was to the accident,
 11 correct?
 12 A. Correct.
 13 Q. At that time when asked by the State
 14 Trooper you didn't say that
 15 Mr. Southworth was intoxicated at the
 16 Longhorn that night, is that correct?
 17 MR. FARRAH: Objection.
 18 A. I don't believe so.
 19 Q. You were asked about that, weren't you?
 20 MR. FARRAH: Objection.
 21 A. I'm sure I was.
 22 Q. He asked you if he showed any visible
 23 signs of intoxication, didn't he?
 24 MR. FARRAH: Objection.

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1 A. I believe so.
 2 Q. Six weeks or whatever it was after the
 3 accident at that point it was your
 4 testimony that there were no visible
 5 signs of intoxication by Mr. Southworth
 6 at the Longhorn Steakhouse, correct?
 7 MR. FARRAH: Objection.
 8 A. Yes.
 9 Q. And that's because that was your memory
 10 at that time, correct?
 11 MR. FARRAH: Objection.
 12 A. Yes.
 13 Q. From the date of this accident,
 14 September 26, 2003 to today, have you
 15 ever told anybody that Mr. Southworth
 16 was unsteady on his feet at the Longhorn
 17 Steakhouse on September 26, 2003?
 18 MR. FARRAH: Objection.
 19 A. No.
 20 Q. Have you ever testified that
 21 Mr. Southworth's eyes were glassy at the
 22 Longhorn Steakhouse on September 26,
 23 2003?
 24 A. Not that I recall.

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1 Q. Have you ever testified that
 2 Mr. Southworth's speech was slurred at
 3 the Longhorn Steakhouse on September 26,
 4 2003?
 5 A. Not that I recall.
 6 Q. Do you have any specific memory as you
 7 sit here today of Jeffrey Southworth
 8 being visibly intoxicated at the
 9 Longhorn Steakhouse on September 26,
 10 2003?
 11 MR. FARRAH: Objection.
 12 A. No.
 13 Q. Do you have any memory as you sit here
 14 today of him stumbling at all at the
 15 Longhorn Steakhouse on September 26,
 16 2003?
 17 A. No.
 18 Q. Do you have any memory of his speech
 19 being slurred at the Longhorn on that
 20 date?
 21 A. No.
 22 Q. Do you have any specific memory as you
 23 sit here today of him being glassy-eyed
 24 at the Longhorn on September 26, 2003?

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1 A. No.
 2 Q. Do you have any memory of him knocking
 3 any drinks over at the table at the
 4 Longhorn on September 26, 2003?
 5 A. Not that I recall.
 6 Q. Do you have any memory as you sit here
 7 today of him ever swaying or unable to
 8 sit up straight at the Longhorn on
 9 September 26, 2003?
 10 MR. FARRAH: Objection.
 11 A. Not that I recall.
 12 Q. In fact whenever you have been asked any
 13 questions about his intoxication you
 14 have testified that you have no evidence
 15 that he was visibly intoxicated at the
 16 Longhorn Restaurant on September 26,
 17 2003, is that correct?
 18 MR. FARRAH: Objection.
 19 A. I have no evidence.
 20 Q. Mr. Farrah asked you earlier whether or
 21 not you were afraid of Mr. Southworth,
 22 is that correct?
 23 A. Correct.
 24 Q. He was your friend, was he not?

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1 A. I thought so.
 2 Q. And you went dirt biking with him
 3 several times a week, is that correct?
 4 A. Yes.
 5 Q. And you borrowed his bike, correct?
 6 A. Correct.
 7 Q. You went out to dinner with him on
 8 regular occasions, correct?
 9 A. Correct.
 10 Q. You wouldn't do that with somebody you
 11 were afraid of, is that correct?
 12 MR. FARRAH: Objection.
 13 A. No.
 14 Q. He didn't force you to go dirt biking
 15 with him, did he?
 16 A. No.
 17 Q. He didn't hold a gun to your head and
 18 say, "You've got to come dirt biking,"
 19 correct?
 20 A. No.
 21 Q. Previously in your answers to questions
 22 asked you by Mr. Farrah you prefaced
 23 those questions by probably. When you
 24 answer questions probably is that

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1 because you don't have a specific memory
 2 of whether it did or did not happen?
 3 MR. FARRAH: Objection.
 4 A. Yes.
 5 Q. And you also answered questions with "I
 6 believe." Is it fair to say that when
 7 you answered that way that you don't
 8 have a specific memory of what was
 9 asked, if it happened or didn't, is that
 10 correct?
 11 MR. FARRAH: Objection.
 12 A. Correct.
 13 Q. When he showed you your transcript, he
 14 asked you to look at testimony that you
 15 had previously testified, correct?
 16 A. Correct.
 17 Q. You don't have a memory of what you said
 18 back then. You just agreed that what
 19 was in the transcript is true, correct?
 20 A. Well, I read it over after they sent it
 21 to me.
 22 Q. If you said that's your best memory, you
 23 just adopted that not because it
 24 refreshed your recollection but because

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1 that was in the prior transcript, isn't
 2 that true?
 3 MR. FARRAH: Objection.
 4 A. Correct.
 5 Q. Did that change your memory any bit
 6 today, your actual memory of what you
 7 actually remember?
 8 MR. FARRAH: Objection.
 9 A. No.
 10 Q. When you said, "I don't think so," does
 11 that mean you're not sure?
 12 MR. FARRAH: Objection.
 13 A. Yes, I'm not positive.
 14 Q. When you said, "I don't think so," that
 15 means you're not sure whether the facts
 16 that were asked of you occurred or
 17 didn't occur, correct?
 18 MR. FARRAH: Objection.
 19 A. Correct.
 20 Q. And furthermore when you answered a
 21 question, "I think," that means you
 22 don't know one way or the other,
 23 correct?
 24 MR. FARRAH: Objection.

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1 A. Yes.
 2 Q. That was your best guess, correct?
 3 A. Yes.
 4 Q. In fact all those premises were your
 5 best guess, correct?
 6 MR. FARRAH: Objection.
 7 A. Correct.
 8 Q. Almost two years ago you were deposed in
 9 this case, June of 2004, correct?
 10 A. Yes.
 11 Q. Your memory was a little better then
 12 than it is today, is that fair to say?
 13 A. Yes.
 14 Q. You brought the cooler that day, is that
 15 correct?
 16 A. Correct.
 17 Q. And you said you had a six-pack in the
 18 cooler, correct?
 19 A. I don't know how much was in the cooler.
 20 Q. When you buy beer, do you buy
 21 twelve-ounce beers?
 22 A. Yes.
 23 Q. The beers in that cooler were
 24 twelve-ounce, correct?

1 MR. FARRAH: Objection.
2 A. I would think so.
3 Q. You don't know whether they were or not,
4 correct?
5 A. I don't, but probably.
6 Q. Was it your practice back then when you
7 bought a six-pack to get a six-pack of
8 twelve-ounce beers as opposed to any
9 other size beer?
10 A. Yes.
11 Q. When you said that the cooler was in the
12 bed of the truck, is it fair to say that
13 you don't know if it was in the back
14 seat with Mr. Southworth or whether it
15 was physically in the bed that evening,
16 is that correct?
17 MR. FARRAH: Objection.
18 A. As I sit here today I don't know.
19 Q. If someone else like Jude testified it
20 was in the back seat, would you disagree
21 with them?
22 MR. FARRAH: Objection.
23 A. No.
24 Q. As you sit here today you can't remember

1 your cell phone number back in September
2 of 2003, correct?
3 A. No.
4 Q. And that's not because you are
5 intoxicated or anything, correct?
6 A. Correct.
7 Q. And the reason you may not remember
8 everything from that evening is not
9 because you were intoxicated, correct?
10 A. Yes.
11 Q. Mr. Farrah says that you never told
12 anybody before that you didn't finish
13 your beer at the bar that night. Do you
14 have any memory of anybody ever even
15 asking you that question before today?
16 MR. FARRAH: Objection.
17 A. No.
18 Q. As you sit here today do you remember
19 anybody ever asking you whether or not
20 you finished your beer at the bar prior
21 to Mr. Farrah asking you that today?
22 MR. FARRAH: Objection to
23 that mischaracterization of my question.
24 A. Not that I recall.

1 Q. Do you know whether or not the tab for
2 the beer that you purchased at the bar
3 was carried over to the dinner check or
4 whether it was paid at the bar?
5 MR. FARRAH: Objection.
6 A. I don't know.
7 Q. You called beforehand to get a table, is
8 that correct?
9 A. Correct.
10 Q. The reason you called was so that you
11 wouldn't have to wait very long, is that
12 correct?
13 A. Correct.
14 Q. And you get put into whatever order it
15 is for a table once you call in for a
16 reservation, correct?
17 MR. FARRAH: Objection.
18 A. Correct.
19 Q. Whatever time it was, a few minutes that
20 you characterized as ten, fifteen, or
21 twenty minutes which Mr. Farrah
22 suggested to you in your deposition,
23 whatever time it was you only had one
24 drink at the bar which you didn't finish

1 and brought to the table, correct?
2 MR. FARRAH: Objection.
3 A. I believe so.
4 Q. As you sit here today do you have any
5 specific memory of having ordered more
6 than one drink at the bar on
7 September 26, 2003?
8 MR. FARRAH: Objection.
9 A. I don't.
10 Q. As you sit here today do you have any
11 specific memory of Mr. Southworth having
12 any more to drink than one beer at the
13 bar on September 26, 2003?
14 MR. FARRAH: Objection.
15 A. I don't.
16 Q. You don't have a specific memory as you
17 sit here today as to what, if anything,
18 Mr. Southworth had to drink at the table
19 once you all were seated, correct?
20 A. Correct.
21 Q. And the three people who were at the bar
22 that night were you, Jude Connelly, and
23 Mr. Southworth, correct?
24 A. Correct.

1 Q. The remainder of the group met you and
 2 were seated at a table, correct?
 3 MR. FARRAH: Objection.
 4 A. Correct.
 5 Q. You don't have any memory as you sit
 6 here today of anybody other than the
 7 three of you ordering drinks at the bar
 8 that evening, correct?
 9 A. Not that I recall.
 10 Q. In your statement that is Exhibit 1 in
 11 this case you mention to the State
 12 Police that you had beer and Manhattans
 13 which you believe were ordered by the
 14 table, correct? Starting at the
 15 third-to-last line it says, "At the"
 16 something "we all ordered beer and
 17 Manhattans. We all ordered," and
 18 something is cut off "table so I can't
 19 be sure who drank how much." Correct?
 20 A. Correct.
 21 Q. You have no idea how much Mr. Southworth
 22 had to drink, correct?
 23 A. Correct.
 24 Q. You had no idea what anybody had to

1 drink, correct?
 2 A. Correct.
 3 Q. And when you say beer and Manhattans
 4 that means that people had beer or
 5 Manhattans, not beer and Manhattans, is
 6 that correct?
 7 MR. FARRAH: Objection.
 8 A. I don't know who drank what.
 9 Q. Do you have a specific memory as you sit
 10 here today that everybody at the table
 11 had a beer and a Manhattan?
 12 MR. FARRAH: Objection.
 13 A. Again I don't know who drank what.
 14 Q. Let me show you what was introduced as
 15 an exhibit in your brother's deposition
 16 which shows two beers ordered that night
 17 at the table. Does that refresh your
 18 recollection as to whether or not
 19 everybody at the table had a beer?
 20 MR. FARRAH: Objection to
 21 that characterization that there were
 22 two beers ordered at the table. You can
 23 answer the question.
 24 A. There were more people than beers.

1 Q. I'm going to suggest for purposes of
 2 this question that this is the bill for
 3 that evening and on there there are two
 4 Bud Lights. Does that refresh your
 5 recollection as to whether or not
 6 everybody at the table had a beer at the
 7 table?
 8 MR. FARRAH: Objection.
 9 A. It suggests they didn't.
 10 Q. But does it reflect your recollection in
 11 any way?
 12 A. No.
 13 Q. Do you have any specific memory as you
 14 sit here today whether or not everybody
 15 at the table had either a beer or a
 16 Manhattan or both a beer and a
 17 Manhattan?
 18 A. I don't have a specific recollection.
 19 Q. Mr. Farrah was questioning you on
 20 Page 74 about your testimony about the
 21 Manhattans. You testified that you had
 22 two beers. "I don't know. I don't
 23 know. I don't know what I had to
 24 drink." Isn't that your testimony?

1 A. Yes.
 2 Q. You don't know what you had to drink
 3 yourself that night, correct?
 4 A. Correct.
 5 Q. You don't know how many Manhattans you
 6 had that night.
 7 A. Correct.
 8 Q. All you know in your statement that you
 9 gave to the State Police is that you
 10 were ordering in rounds, correct?
 11 MR. FARRAH: Objection.
 12 A. I believe so.
 13 Q. What does it mean to you when you say
 14 you ordered as a table?
 15 A. That whoever at the table needed a drink
 16 ordered.
 17 Q. As you sit here today do you have any
 18 specific memory of anybody being served
 19 more than one drink at a table, multiple
 20 drinks per round?
 21 MR. FARRAH: Objection.
 22 A. I don't recall.
 23 Q. Have you ever been to the Longhorn when
 24 they served any person at your table

1 more than one drink per round?
2 A. I don't believe so.
3 Q. Would that be unusual to you?
4 MR. FARRAH: Objection.
5 A. Yes.
6 Q. Now if I were to represent to you that
7 the first round of drinks that were
8 ordered at that table were four drinks,
9 do you have a memory as to whether those
10 were for the four people who joined the
11 three of you at the restaurant?
12 MR. FARRAH: Objection.
13 A. I don't recall.
14 Q. In your prior deposition did Mr. Farrah
15 ever show you a copy of what you guys
16 had to order that night?
17 MR. FARRAH: Objection.
18 A. I don't recall.
19 Q. Did he show you the check for that
20 night?
21 MR. FARRAH: Objection.
22 A. I don't know. I have seen it somewhere
23 in various rounds.
24 Q. How far is the Four Points Hotel from

1 night would you go to Longhorn's?
2 A. Just to drink?
3 Q. Yes.
4 A. Probably not.
5 Q. It's more of a steakhouse restaurant, in
6 your opinion, is that right?
7 MR. FARRAH: Objection.
8 A. Correct.
9 Q. When you got back to the Four Points you
10 went to see some friends with your
11 brother, correct?
12 A. Correct.
13 Q. There was beer and Jack Daniels in the
14 room?
15 A. I don't recall Jack Daniels.
16 Q. If your brother testified that there was
17 Jack Daniels in the room would you doubt
18 him?
19 MR. FARRAH: Objection.
20 A. No.
21 Q. When you left the Longhorn that evening
22 you felt perfectly fine to drive,
23 correct?
24 A. Correct.

1 the Longhorn?
2 A. Maybe half a mile.
3 Q. It takes two minutes for you to get
4 there?
5 A. Yes.
6 Q. Do you know where Chopsticks is?
7 A. Yes.
8 Q. Are you familiar with the place?
9 A. I haven't been there in a while.
10 Q. How would you characterize Chopsticks?
11 A. A Chinese restaurant.
12 Q. Does it have a bar and a lounge,
13 etcetera?
14 A. I assume so.
15 Q. Back in September of 2003 if you were to
16 go to a bar just to drink with your
17 friends where would you go?
18 MR. FARRAH: Objection.
19 A. I don't know. There's no regular place.
20 Q. Is it fair to say Longhorn's is a place
21 you might to go eat as opposed to drink?
22 MR. FARRAH: Objection.
23 A. Yes.
24 Q. If you were going out to drink for the

1 Q. You wouldn't get in an automobile and
2 drive if you were visibly intoxicated,
3 is that correct?
4 MR. FARRAH: Objection.
5 A. Correct.
6 Q. You didn't feel you were visibly
7 intoxicated that evening, correct?
8 MR. FARRAH: Objection.
9 A. Correct.
10 Q. Were you stumbling when you were at the
11 Longhorn that night?
12 A. Not that I felt.
13 Q. Were you slurring your words?
14 A. Not that I recall.
15 Q. Were you unsteady on your feet?
16 A. Not that I recall.
17 Q. Did you knock over any drinks?
18 A. Not that I recall.
19 Q. Were you unable to get up and go to the
20 bathroom without knocking something
21 over?
22 A. Not that I recall.
23 Q. Were you ever told by anyone at the
24 Longhorn that you shouldn't have any

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1 more to drink that night?
 2 A. Not that I recall.
 3 Q. I want to read to you from the bottom of
 4 Page 74. "So you can't tell me where
 5 you sat that night, is that right?"
 6 "Not with certainty, no." "Is that
 7 because you were too intoxicated to
 8 remember?" "No, no."
 9 Did I read that testimony
 10 correctly?
 11 A. Yes.
 12 MR. FARRAH: I will
 13 stipulate to that.
 14 Q. Your testimony back then was clear that
 15 you were not intoxicated at the
 16 Longhorn, correct?
 17 MR. FARRAH: Objection.
 18 A. Correct.
 19 Q. Having had that read, does that refresh
 20 your recollection as to whether or not
 21 you were at any time on September 26,
 22 2003 when you were at the Longhorn
 23 Steakhouse intoxicated?
 24 A. No.

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1 Q. Were you intoxicated that night at the
 2 Longhorn?
 3 A. No.
 4 Q. Is it your memory that Jeff had some
 5 beer to drink at the Four Points after
 6 you left the Longhorn that evening?
 7 A. I believe so.
 8 Q. Do you know whether or not back in
 9 September of 2003 Jeff Southworth was a
 10 person who used marijuana?
 11 A. Not that I had seen.
 12 Q. Had you heard of him smoking pot?
 13 MR. FARRAH: Objection.
 14 A. It wasn't a topic of discussion, no.
 15 Q. Did you ever smoke marijuana back at
 16 that time period?
 17 MR. FARRAH: Objection.
 18 What difference does it make whether he
 19 has ever smoked marijuana?
 20 MR. GILLIS: The same
 21 difference it has when you asked him if
 22 he was intoxicated.
 23 MR. FARRAH: Why don't you
 24 tell him what the implications are of

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1 answering that question?
 2 MR. GILLIS: The same as the
 3 implications of the questions you asked
 4 him whether he was driving intoxicated.
 5 Q. Isn't it true that you testified in the
 6 criminal trial that Jeff Southworth was
 7 not intoxicated when he left the
 8 Longhorn Restaurant?
 9 MR. FARRAH: Objection.
 10 A. To the best of my knowledge.
 11 Q. Were the dogs in the back seat of the
 12 car with him or were they in the cab of
 13 the car?
 14 A. They always were in the back seat.
 15 Q. When he continued asking you on the
 16 bottom of Page 118 and the top of 119 as
 17 to why you asked him whether or not he
 18 should sleep, Lines 10 and 11 on
 19 Page 119 say, "I don't recall it. I
 20 just remember him saying I want to go
 21 home."
 22 Is that accurately read?
 23 MR. FARRAH: Objection.
 24 A. Yes.

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1 Q. Is it fair to say that you don't have a
 2 specific memory as you sit here today as
 3 to why you asked him whether or not he
 4 wanted to stay in the vehicle and sleep?
 5 A. As I said before I was just being a
 6 concerned person.
 7 Q. Is it your practice or custom when you
 8 are leaving friends at the end of the
 9 night to ask them whether or not they
 10 want to stay around or drive home?
 11 MR. FARRAH: Objection.
 12 A. Yes.
 13 Q. If you thought they were intoxicated you
 14 wouldn't let them drive, you would stop
 15 them, is that correct?
 16 A. Correct.
 17 Q. As you sit here today do you know of
 18 anything of yours that was left in the
 19 truck that you hadn't removed yet when
 20 he started to back up the truck, that
 21 were in the bed?
 22 A. I think somehow I left a helmet in
 23 there.
 24 Q. Are you sure or you don't know?

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1 A. I'm not positive.
 2 Q. At the time he was backing up, at that
 3 point in time you weren't aware that
 4 your keys were still in the car,
 5 correct?
 6 A. Correct.
 7 Q. As you sit here today to the best you
 8 know you had removed everything you were
 9 going to remove from that car when he
 10 started backing up, is that correct?
 11 A. Correct.
 12 Q. Mr. Farrah asked you earlier about
 13 whether you would testify if it might
 14 hurt Jeff. Would you lie for Jeff
 15 Southworth?
 16 A. No.
 17 Q. Would you lie under oath for Jeff
 18 Southworth?
 19 A. No.
 20 Q. Would you commit perjury for Jeff
 21 Southworth?
 22 A. No.
 23 Q. Have you ever lied for Jeff Southworth
 24 in this case?

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1 A. No.
 2 Q. Either in this case, in the civil case,
 3 or the criminal case have you ever lied
 4 for Jeff Southworth?
 5 A. No.
 6 Q. Has he ever asked you to lie for him?
 7 A. No.
 8 Q. Has anybody asked you to lie for him?
 9 A. No.
 10 Q. Prior to this incident on September 26,
 11 2003 you had seen Mr. Southworth what
 12 you would call intoxicated, correct?
 13 A. I can't say for sure whether he was or
 14 was not.
 15 Q. Did you ever see him showing signs of
 16 intoxication?
 17 A. Yes.
 18 Q. You have seen him before that night
 19 where he got giddy is the word you used,
 20 correct?
 21 A. Correct.
 22 Q. That he had red eyes, correct?
 23 MR. FARRAH: Objection.
 24 A. Not that I can recall specifically right

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1 now.
 2 Q. Regardless, you didn't see any of the
 3 signs that you previously noticed of him
 4 when he may have been intoxicated, none
 5 of those signs were present on
 6 September 26, 2003 at the Longhorn
 7 Steakhouse, is that correct?
 8 MR. FARRAH: Objection.
 9 A. Correct.
 10 Q. In fact, from your experience of being
 11 out with Mr. Southworth prior to this
 12 night was he a person who could hold his
 13 liquor?
 14 MR. FARRAH: Objection.
 15 A. He was a big kid.
 16 Q. Haven't you seen him drink six to ten
 17 beers and still look okay?
 18 MR. FARRAH: Objection.
 19 A. Again I don't keep track of what other
 20 people drink.
 21 Q. You've seen him drink more than a
 22 six-pack and look to not be visibly
 23 intoxicated, correct?
 24 MR. FARRAH: Objection.

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1 A. Probably.
 2 Q. Isn't that what you testified to at your
 3 last deposition that he could drink six
 4 to ten beers without being visibly
 5 intoxicated?
 6 MR. FARRAH: Objection.
 7 A. I believe so.
 8 Q. You also testified in that deposition
 9 that you mainly went to the Longhorn to
 10 eat, not to drink, is that correct?
 11 A. I believe so.
 12 Q. And that was in a deposition prior to
 13 Longhorn even being involved in this
 14 case, correct?
 15 A. As far as I know.
 16 Q. Before any investigator going out to see
 17 you, correct?
 18 A. Correct.
 19 Q. Prior to September 26, 2003 you've seen
 20 Mr. Southworth drink two to three
 21 Manhattans and look perfectly fine,
 22 correct?
 23 MR. FARRAH: Objection.
 24 A. I believe so. Again, I don't keep track

1 of what people drink.
 2 Q. You've seen him drink Manhattans before
 3 and not appear intoxicated, correct?
 4 A. Correct.
 5 Q. You've seen him drink multiple
 6 Manhattans before September 26, 2003 and
 7 not appear to be intoxicated, correct?
 8 MR. FARRAH: Objection.
 9 A. I believe so.
 10 Q. You have no evidence as you sit here
 11 today of Mr. Southworth having anything
 12 to drink prior to getting to the
 13 Longhorn other than the one twelve-ounce
 14 beer he had just after dirt biking,
 15 correct?
 16 A. Correct.
 17 Q. You don't have any evidence one way or
 18 the other whether or not he was drinking
 19 out of the cooler in the vehicle after
 20 you left the Longhorn, do you?
 21 MR. FARRAH: Objection.
 22 A. No.
 23 Q. Is it fair to say that prior to
 24 September 26, 2003 you have seen

1 Mr. Southworth drink a beer or two and a
 2 Manhattan or two and not appear to be
 3 visibly intoxicated?
 4 MR. FARRAH: Objection.
 5 A. Correct.
 6 Q. The reason you were driving
 7 Mr. Southworth's vehicle that night was
 8 not because he was too drunk to drive,
 9 correct?
 10 MR. FARRAH: Objection.
 11 A. Correct.
 12 Q. That's what you testified to when
 13 Mr. Farrah asked you that question
 14 nearly two years ago, is that correct?
 15 MR. FARRAH: Objection.
 16 A. Correct.
 17 Q. You testified back in 2004 that you
 18 arrived at the restaurant around 8:30 to
 19 9 o'clock. Do you remember that?
 20 A. The testimony?
 21 Q. Yes.
 22 A. Yes.
 23 Q. Do you remember if that is accurate as
 24 to about what time you arrived give or

1 take a few minutes?
 2 A. I would think so.
 3 Q. It was your practice to dirt bike until
 4 it was almost dark, is that correct?
 5 A. Yes.
 6 Q. So from about the time it was almost
 7 dark, say dusk, give or take twenty-five
 8 minutes, that would be about the time
 9 you arrived at the restaurant.
 10 MR. FARRAH: Objection.
 11 A. Probably, yes.
 12 Q. Prior to September 26, 2003 when you had
 13 been out with Mr. Southworth had you had
 14 dinner with him with more than just him
 15 and yourself, with groups of people?
 16 A. Yes.
 17 Q. Was it common to order a round for the
 18 table?
 19 MR. FARRAH: Objection.
 20 A. Yes, it's common practice.
 21 Q. And that's a common practice for you
 22 when you go out to dinner with a group
 23 of people to order a round.
 24 MR. FARRAH: Objection.

1 A. Yes.
 2 Q. When you got a round, again that would
 3 be one drink per person at the table.
 4 MR. FARRAH: Objection.
 5 A. Correct.
 6 Q. You are not aware of any time that you
 7 have been with Mr. Southworth that he
 8 ordered a round of drinks that anyone
 9 has gotten more than one alcoholic drink
 10 at a time.
 11 MR. FARRAH: Objection.
 12 A. Correct.
 13 Q. And that's not just on September 26,
 14 2003. That's any night you have been
 15 out with him, correct?
 16 MR. FARRAH: Objection.
 17 A. Correct.
 18 Q. You were carded that evening, is that
 19 correct?
 20 A. I can't say for sure. I would think so.
 21 Q. Do you remember testifying to that
 22 effect in your prior deposition?
 23 A. I don't remember the specific question,
 24 no.

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1 Q. On Page 76, the question is on Line 20
 2 and the answer is on Line 23.
 3 "Question: Do you remember being
 4 carded, that is, asked to show your
 5 driver's license to anybody that night?"
 6 "Answer: I believe so, yeah."
 7 Did I read that correctly?
 8 A. Yes.
 9 Q. Mr. Farrah discussed with you whether or
 10 not you may have been loud that evening,
 11 and I believe you testified, and correct
 12 me if I am wrong, that "Not particularly
 13 loud." Is that a fair representation of
 14 what you said?
 15 MR. FARRAH: Objection.
 16 A. Yes.
 17 Q. Do you have a specific memory as to
 18 whether or not anybody was loud that
 19 evening at any time?
 20 MR. FARRAH: Objection.
 21 A. No.
 22 Q. Do you remember anybody being loud
 23 towards the end of the evening after you
 24 got your check?

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1 MR. FARRAH: Objection.
 2 A. I don't.
 3 Q. As you sit here today do you have any
 4 specific memory of Jeffrey Southworth
 5 being visibly intoxicated at any time
 6 while at the Longhorn Steakhouse on
 7 September 26, 2003?
 8 MR. FARRAH: Objection.
 9 A. I don't.
 10 Q. Do you remember testifying that when
 11 Mr. Southworth gets drunk he gets
 12 aggressive?
 13 A. I do.
 14 Q. And when he gets intoxicated he gets
 15 jumpy.
 16 A. Not specifically, no.
 17 Q. Do you remember saying that when he is
 18 intoxicated he sort of snaps at people?
 19 A. Yes.
 20 Q. Let me direct you to Page 83 of your
 21 deposition, Lines 7 through 9 and let me
 22 know if I read that correctly. "He just
 23 gets, ah, I don't know. He just gets
 24 like -- I don't know, jumpy I guess,

Page 139

1 short-fused."
 2 Did I read that correctly?
 3 A. Yes.
 4 Q. Line 17, "Jeff sort of snaps at people
 5 and he -- he's just -- it's hard to
 6 explain."
 7 Did I read that correctly?
 8 A. Yes.
 9 Q. Did he show any of those signs at the
 10 Longhorn Steakhouse on September 26,
 11 2003?
 12 MR. FARRAH: Objection.
 13 A. No.
 14 Q. On September 26, 2003 at any time while
 15 he was at the Longhorn Steakhouse was
 16 Mr. Southworth jumpy?
 17 A. Not that I recall.
 18 Q. On September 26, 2003 at the Longhorn
 19 Steakhouse at any time that evening was
 20 Mr. Southworth short-fused?
 21 A. Not that I recall.
 22 Q. At any time on September 26, 2003 at the
 23 Longhorn Steakhouse did Jeff Southworth
 24 snap at anybody?

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1 A. Not that I recall.
 2 Q. You saw him prior to this night get into
 3 a fight when he was intoxicated at the
 4 Wine Cellar, correct?
 5 A. That's correct.
 6 Q. When he got into a fight at the Wine
 7 Cellar did you see any of those signs at
 8 the Longhorn Steakhouse on September 26,
 9 2003?
 10 A. Not that I recall.
 11 Q. Did you tell Mr. Farrah at your last
 12 deposition that Mr. Southworth was not
 13 intoxicated at the Longhorn Steakhouse
 14 that night?
 15 MR. FARRAH: Objection.
 16 A. I believe I said I don't know.
 17 Q. Let me show you Page 88 starting with
 18 Line 16. Question by Mr. Farrah. "Was
 19 he as intoxicated that night as he was
 20 the night of this accident,
 21 September 26, 2003, when you left or
 22 when you were eating at the restaurant?"
 23 The answer was "No. Can you rephrase
 24 that again? No, he wasn't as

1 intoxicated at the Longhorn." Question:
 2 "As he was at the Wine Cellar?"
 3 Answer: Yes."
 4 Did I read that correctly?
 5 A. Yes.
 6 Q. You testified in the prior deposition
 7 that by nature Jeff is an aggressive
 8 guy.
 9 A. Correct.
 10 Q. He was not showing any signs of
 11 aggressiveness on September 26, 2003,
 12 correct?
 13 MR. FARRAH: Objection.
 14 A. Not that I recall.
 15 Q. You've been out with Jeff when he has
 16 had too much to drink, correct?
 17 MR. FARRAH: Objection.
 18 A. I don't know.
 19 Q. Let me show you Page 97, Line 5. The
 20 question was: "But you have been in
 21 settings where Jeff has had too much to
 22 drink, isn't that right?" The answer
 23 was, "Yeah."
 24 Is that your testimony?

1 somewhat. I guess he was aggressive, as
 2 always, as Jeff is." If he showed any
 3 signs of intoxication that evening the
 4 first time you saw it was after drinking
 5 beer at the Four Points Hotel, correct?
 6 MR. FARRAH: Objection.
 7 A. Based on that statement, correct.
 8 Q. That's your prior testimony, correct?
 9 A. Correct.
 10 Q. And that's what you meant, correct?
 11 MR. FARRAH: What he meant?
 12 Q. When he first showed signs of
 13 intoxication after he got his beer at
 14 the hotel, correct?
 15 MR. FARRAH: Objection.
 16 A. Correct.
 17 Q. Not at the restaurant, correct?
 18 MR. FARRAH: Objection.
 19 A. Not that I recall.
 20 Q. You had a conversation with Jude
 21 Connelly about this accident sometime
 22 after the accident, correct?
 23 A. Correct.
 24 Q. What did Jude tell you to do?

1 A. Yes.
 2 Q. As you sit here today on September 26,
 3 2003 while at the Longhorn Restaurant
 4 those signs that you saw in
 5 Mr. Southworth on other occasions when
 6 he had too much to drink, none of them
 7 was shown by him that night at the
 8 restaurant, correct?
 9 MR. FARRAH: Objection.
 10 A. Not that I recall.
 11 Q. In fact, the first time you saw any sign
 12 of intoxication by Mr. Southworth that
 13 night was when he was drinking at the
 14 hotel, correct?
 15 MR. FARRAH: Objection.
 16 A. Again I'm not sure.
 17 Q. Page 107, Line 19. The question was,
 18 "What did you do at the Four Points?"
 19 "Definitely had a beer," and it goes on
 20 from there. Page 108. "Did Jeff have a
 21 beer?" The answer was, "Yes." Skip
 22 down to Line 7. "By that time when he
 23 had his beer was he showing obvious
 24 signs of intoxication to you?" "Um,

1 MR. FARRAH: Objection.
 2 A. It was more that we were both obviously
 3 going to be questioned about it.
 4 Q. Do you remember testifying to Mr. Farrah
 5 based on questions when asked what Jude
 6 said that he told you to tell the truth?
 7 A. I think it was more --
 8 Q. Go to Page 131, Line 17. "And what did
 9 Jude say?" "He said we have to tell the
 10 truth."
 11 Is that what Jude told you
 12 to do?
 13 A. Yeah.
 14 Q. And is that what you have done?
 15 A. Yes.
 16 Q. Do you know of any reason other than the
 17 passage of time that your testimony
 18 today may be a little different than
 19 what you previously testified?
 20 MR. FARRAH: Objection.
 21 A. I don't.
 22 Q. Did you wear to the Longhorn that night
 23 the clothes that you were dirt biking
 24 in?

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1 A. No, I don't believe so.
2 Q. Do you have a specific memory of what
3 you wore that night?
4 A. I don't.
5 Q. Do you have a specific memory as you sit
6 here today as to what Jeff Southworth
7 wore that night?
8 A. I don't.
9 Q. You can't tell me whether he did or did
10 not change into another outfit from dirt
11 biking, correct?
12 A. We normally change.
13 Q. That night you don't know whether he was
14 wearing sweat pants to the Longhorn or
15 whether he got dressed up in other
16 clothes, correct?
17 A. I don't know what he wore.
18 MR. GILLIS: No further
19 questions.
20 REDIRECT EXAMINATION
21 BY MR. FARRAH
22 Q. You talked a little bit about Jude
23 telling you to tell the truth. Do you
24 remember that?

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1 A. Yes.
2 Q. As far as you know Jude told the truth
3 about what happened that night, isn't
4 that right?
5 MR. GILLIS: Objection.
6 A. I would think so.
7 Q. He never discussed with you lying about
8 what happened that night, did he?
9 A. No.
10 Q. You were asked some questions about
11 instances where Mr. Southworth had
12 multiple Manhattans. Do you remember
13 Mr. Gillis asking you about that?
14 A. Yes.
15 Q. These were instances during the summer
16 of 2003 at the Longhorn Steakhouse where
17 Mr. Southworth was served multiple
18 Manhattans, isn't that right?
19 MR. GILLIS: Objection.
20 A. I don't know where it happened.
21 Q. You were with him at the Longhorn
22 Steakhouse on at least a half a dozen
23 occasions during the summer of 2003,
24 isn't that right?

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1 A. Yes.
2 Q. He liked Manhattans, is that right?
3 MR. GILLIS: Objection.
4 A. I have seen him drink them before.
5 Q. You have seen him drink multiple
6 Manhattans prior to September 26, 2003
7 at the Longhorn, isn't that right?
8 MR. GILLIS: Objection.
9 A. At the Longhorn, yes.
10 Q. Is it your best memory that your brother
11 and the people that he was with were at
12 the bar drinking at the Longhorn that
13 night before you all went to the table?
14 MR. GILLIS: Objection.
15 A. I don't recall when they showed up.
16 Q. That's not my question. My question is
17 is it your best memory that your brother
18 and the others that he was with that
19 night were drinking at the bar before
20 you all went to the table?
21 MR. GILLIS: Objection.
22 A. I don't know.
23 Q. Think hard.
24 MR. GILLIS: Objection.

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1 Q. Do you remember your brother having a
2 drink at the bar?
3 MR. GILLIS: Objection.
4 A. I don't.
5 Q. Do you remember any of the people he was
6 with having a drink at the bar?
7 MR. GILLIS: Objection.
8 A. I don't remember when they got there.
9 Q. Is it fair to say you don't remember one
10 way or the other whether they had drinks
11 at the bar that night?
12 A. That's correct.
13 Q. You testified on more than one occasion,
14 I think, both during my examination and
15 Mr. Gillis's that you didn't know
16 whether or not Jeff Southworth was under
17 the influence of alcohol at the time he
18 was at the Longhorn Restaurant. Do you
19 remember that testimony?
20 MR. GILLIS: Objection.
21 A. Yes.
22 Q. You also testified to Mr. Gillis's
23 question that Mr. Southworth was
24 exhibiting none of the signs of

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1 intoxication you had seen on prior
2 occasions. Do you remember that
3 testimony?
4 A. Yes.
5 Q. Yet you can't say as you sit here today
6 whether he was under the influence of
7 intoxicating alcohol at the time he was
8 at the Longhorn, is that right?
9 MR. GILLIS: Objection.
10 A. Either way I can't say.
11 Q. Is that because of the amount of alcohol
12 that he was served that night?
13 MR. GILLIS: Objection.
14 A. I don't know what he was served.
15 Q. My question to you is given that your
16 testimony is that he did not exhibit to
17 your eye any of the signs of
18 intoxication that you had previously
19 seen in him where he was under the
20 influence of alcohol, why is it you
21 cannot say that you know he was not
22 under the influence of alcohol that
23 night?
24 A. Two and a half years ago? I don't know

1 A. No.
2 Q. I'll represent to you that that's what
3 the documents supplied by Rare
4 Hospitality says happened. You know
5 that Jeff had some of those Jack Daniels
6 Manhattans that were ordered, isn't that
7 right?
8 MR. GILLIS: Objection.
9 A. Yeah.
10 Q. You know that two people got killed in
11 an accident, don't you?
12 A. Yes.
13 Q. And you know that other people got
14 seriously injured in the accident, don't
15 you?
16 A. Yes.
17 Q. You understand that part of the case
18 that my clients have brought against
19 Rare is that it served him too much
20 alcohol that night, you understand that.
21 A. Yes.
22 Q. You want to tell the truth, isn't that
23 right?
24 A. Yes.

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Page 152

1 either way.
2 Q. He had a fair amount to drink while he
3 was at the Longhorn that night, isn't
4 that right?
5 MR. GILLIS: Objection.
6 A. I don't know what he had to drink.
7 Q. You know he had Manhattans, isn't that
8 right?
9 MR. GILLIS: Objection.
10 A. I know that there were some ordered.
11 Q. Seventeen were ordered, isn't that
12 right?
13 MR. GILLIS: Objection.
14 Q. You have seen the tab for the
15 restaurant, haven't you?
16 A. Yes.
17 Q. You know seventeen Jack Daniels
18 Manhattans were ordered in a space of
19 time between 8:40 P.M. and 9:24 P.M.
20 that night.
21 MR. GILLIS: Objection.
22 Q. Isn't that right?
23 A. I don't know the time frame.
24 Q. You don't know that?

1 Q. So now do you know or don't you know
2 that Jeff Southworth had Jack Daniels
3 Manhattans at the table that night?
4 MR. GILLIS: Objection.
5 A. Yes.
6 Q. Do you know how many he had that night?
7 A. No.
8 Q. Did he have more than one that night?
9 A. Possibly.
10 Q. Do you believe he had more than one that
11 night?
12 MR. GILLIS: Objection.
13 A. Yeah.
14 Q. Do you believe he had more than two that
15 night?
16 A. I don't know.
17 Q. How about beers at the bar?
18 A. I don't know.
19 Q. How many beers did he have at the bar?
20 A. I don't know.
21 Q. During the half hour that you were at
22 the bar how many beers did he have?
23 A. I know of the first one that we ordered.
24 Q. How about a second one?

1 A. I don't know.
2 Q. How about beers at the table? Did you
3 see Jeff drinking beers at the table?
4 MR. GILLIS: Objection.
5 A. I can't recall.
6 Q. Do you have any memory at all as you sit
7 here of seeing Jeff drink beers from the
8 cooler that you had brought after you
9 left the dirt bikes? Do you have a
10 memory of seeing him reach into the
11 cooler and pull out a beer after that?
12 A. Just one.
13 Q. That was at Templeton?
14 A. Correct.
15 Q. Do you have any reason to believe that
16 he had any more beers from that cooler
17 after the one that each of you had at
18 Templeton?
19 A. I don't.
20 Q. Do you have any reason to believe that
21 Jeff was smoking pot that night?
22 A. I don't.
23 Q. You were asked some questions about
24 whether or not you would ever drive if

1 you were under the influence of alcohol,
2 and if you care not to answer this
3 question that's fine, but have you ever
4 driven while you were under the
5 influence of alcohol?
6 MR. GILLIS: Objection.
7 A. I don't want to answer that question.
8 Q. Have you been convicted of a misdemeanor
9 in the last five years?
10 A. No.
11 Q. You were arrested for possession of
12 marijuana, isn't that right?
13 A. Correct.
14 Q. What was the disposition of that case?
15 A. Somebody else dropped in my vehicle and
16 he complained it.
17 Q. Are you telling me that as far as you
18 know you were found not guilty?
19 A. Yes.
20 Q. In what court was that case pending?
21 A. Clinton.
22 Q. District Court?
23 A. Yes.
24 MR. FARRAH: That's all I

1 have.
2 RE CROSS-EXAMINATION
3 BY MR. GILLIS
4 Q. Other than Mr. Farrah pestering you with
5 the same questions do you have any
6 explanation as to why in the answer to
7 his recent question you said he may have
8 had one or more Manhattans when every
9 other time you've testified you don't
10 know what he had to drink?
11 MR. FARRAH: Objection.
12 A. Just the bill.
13 Q. Other than the bill you have no memory
14 whatsoever as to what Mr. Southworth had
15 to drink on September 26, 2003 at the
16 Longhorn, is that correct?
17 MR. FARRAH: Objection.
18 A. Correct.
19 [The deposition was
20 concluded.]
21
22
23
24

1 SIGNATURE PAGE/ERRATA SHEET
2 Re: Nancy Rosario
3 Vs: Rare Hospitality International, Inc.,
4 d/b/a Longhorn Steakhouse
5 4/25/2006 - Deposition of THOMAS SCOTT ESPEY
6 I, THOMAS SCOTT ESPEY, do hereby certify
7 that I have read the foregoing transcript of
8 my testimony and it is a true and correct
9 record of my testimony (with the exception of
10 the corrections, if any, listed below.
11
12
13
14
15
16
17
18
19
20 DATE THOMAS SCOTT ESPEY
21
22
23
24

1 CERTIFICATE

2 COMMONWEALTH OF MASSACHUSETTS)
3 COUNTY OF SUFFOLK)

4 I, Rosamond K. Marcy, Certified
5 Shorthand/Registered Professional Reporter, a
6 Notary Public in and for the Commonwealth of
Massachusetts, do hereby certify:

7 That THOMAS SCOTT ESPEY, the witness
8 whose deposition is hereinbefore set forth,
9 was duly sworn by me and that such deposition
10 is a true record of the testimony given by
11 said witness.

12 I further certify that I am not related
13 to any of the parties to this action by blood
14 or marriage, and that I am in no way
15 interested in the outcome of this matter.

16 IN WITNESS WHEREOF, I have hereunto set
17 my hand and affixed my seal of office this
18 23rd day of May, 2006.

14

15 ROSAMOND K. MARCY

16 My commission expires:
17 April 6, 2012.

18

19 PLEASE NOTE:
20 THE FOREGOING CERTIFICATION OF THIS
21 TRANSCRIPT DOES NOT APPLY TO ANY
22 REPRODUCTION OF THE SAME BY ANY
23 MEANS UNLESS UNDER THE DIRECT
24 CONTROL AND/OR DIRECTION OF THE
CERTIFYING REPORTER.

23

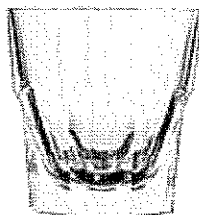
24

BAR GLASSWARE

GLASSWARE

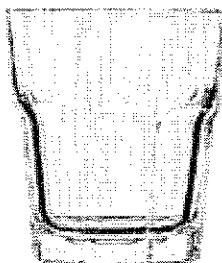
USAGE

Libbey #15245
3 dozen per case
7 oz. Rocks



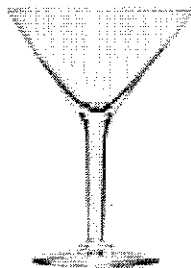
Liquor drinks w/no mixer
Drinks Served on the Rocks
Drinks Served with a Splash
Shooters with cream or Juice mixer

Libbey #15243
3 dozen per case
12 oz. Rocks



Juice Drinks
Collins
Sours
2 Liquor cream drinks
Drinks w/ soda gun mixer

Libbey #8455
3 dozen per case
6 oz. Cocktail Glass

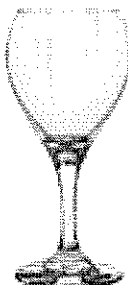


All chilled up cocktails
Martini, Manhattan, Gimlet & Gibson
Martinis Up
Sours Up
Margaritas Up

Libbey #3965

3 dozen per case

8.5 oz. Wine Glass

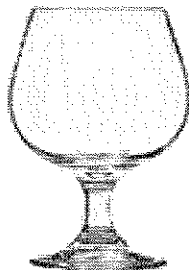


Wine/Champagne by the Glass

Libbey #3705

2 dozen per case







12 oz. Snifter Glass

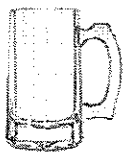



Aromatic Liqueurs


Brandies


Cognac


NAME GARNISH	METHOD CAT.	INGREDIENTS		
KIR ROYALE Wine Glass	Build 	6 oz. Champagne Split ½ oz. Chambord	Lemon twist	Cham- pagne
LONG BEACH ICED TEA 14 oz. Tall Rocks	Mix 	2oz. Desert Island Tea Mix 4oz. Sweet/Sour Fill to ¼ " from top with 1 oz. Cranberry Juice.	Lemon squeeze	Liquor Special
LONG ISLAND ICED TEA 14 oz. Tall Rocks	Mix 	2 oz. Desert Island Tea Mix 4 oz. Sweet/Sour Fill to ¼ " from top with 1 oz. Coke	Lemon squeeze	Liquor Special
JACKALOPE TEA 14 oz. Tall Rocks	Mix 	1oz. Jack Daniels 1oz. Desert Island Tea Mix 4½ oz. Longhorn Sweet n Sour Fill w/Coke	Lemon Wedge	\$5.25
RAZZMATAZZ TEA 14 oz. Tall Rocks	Mix 	1oz. Dekuyper Razzmatazz 1oz. Desert Island Tea Mix 4½ oz. Longhorn Sweet n Sour Fill w/Sprite	Lemon Wedge	\$5.25
LIMON-ADE TEA 14 oz. Tall Rocks	Mix 	1oz. Bacardi Limon Rum 1oz. Desert Island Tea Mix 4½ oz. Longhorn Sweet n Sour Fill w/Coke	Lemon Wedge	\$5.25

MAI-TAI	Mix	1½ oz. House Rum	Orange, Cherry	Liquor
12 oz. Mug		¾ oz. Triple Sec	Flag	Special
		2 oz. Sweet/Sour		
		½ oz. Grenadine		
		1 oz. Orange Juice		
		1 oz. Pineapple Juice		
		Float 151		

MANHATTAN	Build	2 oz. House Bourbon	Cherry	Call
7 oz. Rocks		¼ oz. Sweet Vermouth		


MANHATTAN-DRY	Build	2 oz. House Bourbon	Lemon twist	Call
7 oz. Rocks		¼ oz. Dry Vermouth		

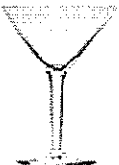
MANHATTAN PERFECT	Build	2 oz. House Bourbon	Lemon twist	Call
7 oz. Rocks		Equal parts Sweet and Dry Vermouth		

NAME	METHOD	INGREDIENTS		
GARNISH	CAT.			
MANHATTAN UP		2 oz. House Bourbon	Cherry sword	Call
6 oz. Cocktail		¼ oz. Sweet Vermouth		
With ice, build in mixing glass, stir until glass is foggy. Strain into chilled				


cocktail glass.

MARGARITA (HOUSE) 12 oz. Mug	Build 	1 1/4 Cuervo Gold oz. Triple Sec 3/4 oz. Lime Juice 1/2 oz. Sweet/Sour 4 oz.	Salt Rim Lime Squeeze	Call
------------------------------------	--	--	------------------------------	------

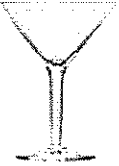
MARTINI 6 oz. Cocktail	Build 	2 oz. House Vodka or Gin Dash of Dry Vermouth <u>Martini Dry:</u> Less than a dash. <u>Martini Extra Dry:</u> <u>NO</u> Vermouth <u>Martini Dirty:</u> Dash olive juice	Two queen size olives sword or lemon twist	Call
---------------------------	--	---	--	------

MARTINI-UP 6 oz. Cocktail With ice, build in mixing glass, stir until glass is foggy. Strain into chilled cocktail glass.		2 oz. House Vodka or Gin Dash of Dry Vermouth <u>Martini Dry:</u> Less than a dash. <u>Martini Extra Dry:</u> <u>NO</u> Vermouth <u>Martini Dirty:</u> Dash olive juice	Two queen size olives sword or lemon twist	Call
---	---	---	--	------


LONGHORN GREEN APPLE	Chill	1 1/4 oz. Grey Goose Vodka	No garnish	Special Liquor
-------------------------	-------	----------------------------	------------	-------------------


MARTINI		1 ¼ oz. Dekuyper Apple Pucker	+\$\$.50
6 oz. Cocktail glass			

Mix/Strain

TANQUERAY NO. TEN MARTINI	Chill	2 oz. Tanqueray No. Ten Gin	Two green olives	Special
6 oz. Cocktail glass		¼ oz. Dry Vermouth		Liquor
				+\$\$.50

Mix/Strain

MIMOSA	Build	6 oz. Champagne Split	Orange slice	Cham-
Wine Glass		1 oz. Orange Juice		pagne

MUDDY RIVER	Mix	½ oz. Vodka	Prem.
7 oz. Rocks		½ oz. Kahlua	
		½ oz. Bailey's	

Drink Making Techniques

- Fill your glass to the top with ice. Always full, not overflowing.
- When in doubt, look up the recipe.
- Follow proper drink making techniques.
- Fill drinks to proper serving Level. All drinks ¼" from the lip of the glass.
- Use fresh and proper garnishes.
- Check back with guest to see how the drink tastes.

Blender Technique: ISLAND OASIS

1. Fill ice hopper to within one inch of the top with cube ice. Be sure ice is free of any debris such as bottle caps. These can jam the machine and cause damage to the shaver blade.
2. Place cover on ice hopper and turn on power.
3. Use the Island Oasis measuring cup and pour the amounts of mix and liquor needed into the blender cup.
4. Place the blender into the blender base. Press the drink button and wait until blender cycle comes to a complete stop.
5. Remove the blender cup and pour the cocktail into your glass and garnish.

There should not be any over pour! Practice, Practice, and Practice.

If you find the drink to be too thick you need to add more mix when putting in the liquid Ingredients. If the drink is too runny, less mix should be used when adding the liquid Ingredients. To insure a perfect pour, pay attention to the level of the liquid ingredients. The amount of ice should never change.

Examples: Frozen Margarita, Pina Colada, Strawberry Daiquiri.

Build Technique: The build technique is used with any drink that we pour the ingredients directly into the glass it is served in. Fill the glass completely with

227 North Main Street

Server: LEIGH

09/26/2003

Table 52/1

9:57 PM

Waiters: 6

#20043

Receipt #: 5

Texas Tonion	5.99
Chowder-Cup (2 @2.49)	4.98
Chicken Fingers	4.99
Back Daniels (17 @4.75)	80.75
Manhattan Mixer (17 @0.50)	8.50
5oz Bud Light (2 @3.99)	7.98
10oz The Renegade	10.99
Half Back Ribs 1/2 Rack (3 @12.99)	38.97
2oz Prime Rib	14.99
Half Back Ribs & Chicken	14.99

Subtotal 193.13

Sub Total 193.13

Tax 9.66

Total 202.79

Tip 240.00

Make plans to dine with us at
Longhorn Steakhouse.

We will make your dining
experience special.

--- Check Closed ---

145 - Longhorn of Leominster
227 North Main Street

Audit Report

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525.180

Time	Type	Transaction
		0.00 Rice
		12.99 1/2 Rack
		0.00 FF
		0.00 Slaw
07:59 PM	LOG OUT	Log Out Emp: 9882 LEIGH
07:59 PM	LOG IN	Log In Emp: 9882 LEIGH
07:59 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:10 PM	LOG IN	Log In Emp: 9882 LEIGH
08:10 PM	CLEARED ITEMS	Mgr 9882 LEIGH Emp 9882 LEIGH cleared \$ 1.89 from Table 63 Chk:40054 1.89 IBC [0.000000 Kg] 0.00 MUG [0.000000 Kg]
08:10 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 1.89 for Table 63 Chk:40054 1.89 IBC 0.00 No Mug
08:10 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:10 PM	LOG IN	Log In Emp: 9882 LEIGH
08:10 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:30066 Printed 1 time(s)
08:10 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:15 PM	LOG IN	Log In Emp: 9882 LEIGH
08:15 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:16 PM	LOG IN	Log In Emp: 9882 LEIGH
08:16 PM	APPLY PAYMENT	Mastercard on Table 52 Chk:30066 by 9882 LEIGH 57.22 Tip:0.00 ID:5511910207971723 Exp:0606
08:17 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:30066 Printed 2 time(s)
08:17 PM	CLOSE CHECK	Emp: 9882 LEIGH closed Table 52 Chk:30066 for a total of 57.22
08:17 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:21 PM	LOG IN	Log In Emp: 9882 LEIGH
08:21 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 62 Chk:50036 Printed 1 time(s)
08:21 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:27 PM	LOG IN	Log In Emp: 9882 LEIGH
08:27 PM	ADJUST PAYMENT	Mastercard on Table 52 Chk:30066 by 9882 LEIGH Amt:57.22 Tip:0.00 -> 12.00 ID:5511910207971723 Exp:0606
08:28 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:31 PM	LOG IN	Log In Emp: 9882 LEIGH
08:32 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 63 Chk:40054 Printed 1 time(s)
08:32 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 3.99 for Table 53 Chk:40051 3.99 Pie
08:32 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:37 PM	LOG IN	Log In Emp: 9882 LEIGH
08:37 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 53 Chk:40051 Printed 1 time(s)
08:37 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:40 PM	LOG IN	Log In Emp: 9882 LEIGH
08:40 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 35.70 for Table 52 Chk:20043 5.99 Tonion 2.49 Chowder Cup 2.49 Chowder Cup 4.99 Fingers 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix

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Time	Type	Transaction
08:40 PM	LOG OUT	3.99 25oz Bud Light Log Out Emp: 9882 LEIGH
08:43 PM	LOG IN	Log In Emp: 9882 LEIGH
08:43 PM	APPLY PAYMENT	Cash on Table 63 Chk:40054 by 9882 LEIGH 50.00
08:43 PM	APPLY PAYMENT	Cash on Table 63 Chk:40054 by 9882 LEIGH 5.00
08:43 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 63 Chk:40054 Printed 2 time(s)
08:43 PM	CLOSE CHECK	Emp: 9882 LEIGH closed Table 63 Chk:40054 for a total of 50.41
08:43 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 9.74 for Table 63 Chk:30084 4.99 25oz Wach 4.75 Sombbrero
08:43 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 34.47 for Table 63 Chk:30084 16.99 14oz Strip CC 0.00 MR 0.00 FF 0.00 Caesar Salad 2.49 Side Mush 14.99 PR 12oz 0.00 MR PR 0.00 FF 0.00 Caesar Salad
08:43 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:44 PM	LOG IN	Log In Emp: 9882 LEIGH
08:44 PM	APPLY PAYMENT	Cash on Table 53 Chk:40051 by 9882 LEIGH 50.00
08:44 PM	APPLY PAYMENT	Cash on Table 53 Chk:40051 by 9882 LEIGH 20.00
08:44 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 53 Chk:40051 Printed 2 time(s)
08:44 PM	CLOSE CHECK	Emp: 9882 LEIGH closed Table 53 Chk:40051 for a total of 56.28
08:44 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:51 PM	LOG IN	Log In Emp: 9882 LEIGH
08:51 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 36.75 for Table 52 Chk:20043 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix
08:51 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:55 PM	LOG IN	Log In Emp: 9882 LEIGH
08:55 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 10.37 for Table 53 Chk:20047 6.59 Fire Wrap 1.89 Sprite 1.89 Sprite
8:55 PM	LOG OUT	Log Out Emp: 9882 LEIGH
08:59 PM	LOG IN	Log In Emp: 9882 LEIGH
09:00 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 79.94 for Table 52 Chk:20043

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227 North Main Street

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Time	Type	Transaction
		10.99 Sm-Top 8oz
		0.00 M
		0.00 BP
		0.00 E
		0.00 Caesar Salad
		12.99 1/2 Rack
		0.00 FF
		0.00 Slaw
		14.99 PR 12oz
		0.00 M PR
		0.00 BP
		0.00 E
		0.00 Mix Green Sal
		0.00 Ranch
		14.99 1/2 Rack/ Chix
		0.00 FF
		0.00 Slaw
		0.00 Mix Green Sal
		0.00 Balsamic
		12.99 1/2 Rack
		0.00 FF
		0.00 FF
		12.99 1/2 Rack
		0.00 FF
		0.00 FF
09:00 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:08 PM	LOG IN	Log In Emp: 9882 LEIGH
09:09 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 29.98 for Table 53 Chk:20047
		10.99 Sm-Top 8oz
		0.00 Well Done
		0.00 BP
		0.00 S
		0.00 Mix Green Sal
		0.00 House
		18.99 Lky/ Sam CC
		0.00 Well Done
		0.00 Seasonal Veg
		0.00 Rice
		0.00 Mix Green Sal
		0.00 Italian
09:09 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:15 PM	LOG IN	Log In Emp: 9882 LEIGH
09:15 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 3.99 for Table 52 Chk:20043
		3.99 25oz Bud Light
09:15 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:16 PM	LOG IN	Log In Emp: 9882 LEIGH
09:16 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:17 PM	LOG IN	Log In Emp: 9882 LEIGH
09:17 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 1 time(s)
09:17 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:21 PM	LOG IN	Log In Emp: 9882 LEIGH
09:21 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 21.00 for Table 52 Chk:20043
		4.75 Jack Daniels
		0.50 Manhattan Mix
		4.75 Jack Daniels
		0.50 Manhattan Mix
		4.75 Jack Daniels
		0.50 Manhattan Mix

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Time	Type	Transaction
		4.75 Jack Daniels 0.50 Manhattan Mix
09:21 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:24 PM	LOG IN	Log In Emp: 9882 LEIGH
09:24 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 15.75 for Table 52 Chk:20043 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix 4.75 Jack Daniels 0.50 Manhattan Mix
09:24 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:31 PM	LOG IN	Log In Emp: 9882 LEIGH
09:31 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 63 Chk:30084 Printed 1 time(s)
09:31 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:33 PM	LOG IN	Log In Emp: 9882 LEIGH
09:34 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 2 time(s)
09:34 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 3 time(s)
09:34 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:35 PM	LOG IN	Log In Emp: 9882 LEIGH
09:35 PM	APPLY PAYMENT	Visa on Table 63 Chk:30084 by 9882 LEIGH 46.42 Tip:0.00 ID:4491631021235627 Exp:1103
09:35 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:36 PM	LOG IN	Log In Emp: 9882 LEIGH
09:36 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 4 time(s)
09:36 PM	APPLY PAYMENT	Cash on Table 62 Chk:50036 by 9882 LEIGH 50.00
09:36 PM	APPLY PAYMENT	Cash on Table 62 Chk:50036 by 9882 LEIGH 10.00
09:36 PM	APPLY PAYMENT	Cash on Table 62 Chk:50036 by 9882 LEIGH 1.00
09:36 PM	APPLY PAYMENT	Cash on Table 62 Chk:50036 by 9882 LEIGH 10.00
09:36 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 62 Chk:50036 Printed 2 time(s)
09:36 PM	CLOSE CHECK	Emp: 9882 LEIGH closed Table 62 Chk:50036 for a total of 61.56
09:36 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:40 PM	LOG IN	Log In Emp: 9882 LEIGH
09:40 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 53 Chk:20047 Printed 1 time(s)
09:40 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:40 PM	LOG IN	Log In Emp: 9882 LEIGH
09:40 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:44 PM	LOG IN	Log In Emp: 9882 LEIGH
09:44 PM	APPLY PAYMENT	Visa on Table 53 Chk:20047 by 9882 LEIGH 42.37 Tip:0.00 ID:4773550000020827 Exp:1103
09:44 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:46 PM	LOG IN	Log In Emp: 9882 LEIGH
09:46 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 5 time(s)
09:46 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:49 PM	LOG IN	Log In Emp: 9882 LEIGH
9:49 PM	ADJUST PAYMENT	Visa on Table 53 Chk:20047 by 9882 LEIGH Amt:42.37 Tip:0.00 -> 2.63 ID:4773550000020827 Exp:1103
09:49 PM	ADJUST PAYMENT	Visa on Table 63 Chk:30084 by 9882 LEIGH

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52.5180

Time	Type	Transaction
09:49 PM	PRINT CHECK	Amt:46.42 Tip:0.00 -> 7.00 ID:4491631021235627 Exp:1103
09:49 PM	CLOSE CHECK	Emp: 9882 LEIGH printed Table 53 Chk:20047 Printed 2 time(s)
09:49 PM	PRINT CHECK	Emp: 9882 LEIGH closed Table 53 Chk:20047 for a total of 42.37
09:49 PM	CLOSE CHECK	Emp: 9882 LEIGH printed Table 63 Chk:30084 Printed 2 time(s)
09:49 PM	ORDER ITEMS	Emp: 9882 LEIGH closed Table 63 Chk:30084 for a total of 46.42
		Emp 9882 LEIGH ordered \$ 3.78 for Table 63 Chk:20052
		1.89 Coke
		1.89 Coke
09:49 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:52 PM	LOG IN	Log In Emp: 9882 LEIGH
09:53 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 3.49 for Table 53 Chk:40069
		3.49 Heineken
		0.00 MUG
		0.00 Water
09:53 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:57 PM	LOG IN	Log In Emp: 9882 LEIGH
09:57 PM	APPLY PAYMENT	Cash on Table 52 Chk:20043 by 9882 LEIGH
		100.00
09:57 PM	APPLY PAYMENT	Cash on Table 52 Chk:20043 by 9882 LEIGH
		100.00
09:57 PM	APPLY PAYMENT	Cash on Table 52 Chk:20043 by 9882 LEIGH
		20.00
09:57 PM	APPLY PAYMENT	Cash on Table 52 Chk:20043 by 9882 LEIGH
		20.00
09:57 PM	PRINT CHECK	Emp: 9882 LEIGH printed Table 52 Chk:20043 Printed 6 time(s)
09:57 PM	CLOSE CHECK	Emp: 9882 LEIGH closed Table 52 Chk:20043 for a total of 202.79
09:58 PM	LOG OUT	Log Out Emp: 9882 LEIGH
09:58 PM	LOG IN	Log In Emp: 9882 LEIGH
09:58 PM	CLOSE CHECK	Emp: 9882 LEIGH Check Table 73 Chk:40070 was freed because it was empty.
09:58 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 6.59 for Table 53 Chk:40069
		6.59 Fire Wrap
09:58 PM	LOG OUT	Log Out Emp: 9882 LEIGH
10:03 PM	LOG IN	Log In Emp: 9882 LEIGH
10:03 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 4.99 for Table 53 Chk:40069
		4.99 Fried Cake
10:03 PM	LOG OUT	Log Out Emp: 9882 LEIGH
10:06 PM	LOG IN	Log In Emp: 9882 LEIGH
10:07 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 29.76 for Table 73 Chk:20054
		1.89 Diet Coke
		8.99 Sam Caes-D
		0.00 With Hot
		0.00 See Server
		16.99 PR 16oz
		0.00 Rare PR
		0.00 Seasonal Veg
		0.00 Caesar Salad
		1.89 Tea
10:07 PM	LOG OUT	Log Out Emp: 9882 LEIGH
10:10 PM	LOG IN	Log In Emp: 9882 LEIGH
10:10 PM	ORDER ITEMS	Emp 9882 LEIGH ordered \$ 24.98 for Table 73 Chk:20054
		12.49 Fried Dinner
		0.00 FF
		0.00 Slaw
		12.49 Fried Dinner

THE UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS)
 SHE IS THE ADMINISTRATRIX OF THE)
 ESTATE OF AWILDA SANTIAGO, ESSEX)
 PROBATE COURT DOCKET #03P-2499ADI)
 P/P/A VERONICA ROSARIO AND)
 CHRISTINA SANTIAGO, AND AS SHE IS)
 THE ADMINISTRATRIX OF THE ESTATE) Civil Action Number:
 OF JOSE SANTIAGO, BERLIN) 05 CV 1061MLW
 (CONNECTICUT) PROBATE COURT,)
 CASE #03-0713,)
 Plaintiff(s),)
 vs.)
 RARE HOSPITALITY INTERNATIONAL,)
 INC., d/b/a LONGHORN STEAKHOUSE,)
 Defendant.)

VIDEO DEPOSITION OF:

LEIGH CHABOT

SCHEDULED TO BE TAKEN ON:

March 10, 2006

Beginning at 10:00 A.M.

Starkings Court Reporting & Video Services
 302 Mason Street, Post Office Box 1345
 Telephone (910) 323-4232 or 1-800-328-3747

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Please Note: Proper nouns MAY BE spelled
 Phonetically. No exhibits were presented to the
 reporter to attached to the transcript.

A P P E A R A N C E S:

ON BEHALF OF THE PLAINTIFF(S):

ALBERT FARRAH, JR., ESQUIRE
 One Washington Mall, 5th Floor
 Boston, MA 02108
 alf@afarrah.com

ON BEHALF OF THE DEFENDANT(S):

MICHAEL K. GILLIS, ESQUIRE
 NEIL SCHNAURBACH, ESQUIRE
 GILLIS & BIKOFKY
 1150 Walnut Street
 Newton, MA 02446
 mgillis@gillisandbikofsky.com

KRISTEN HATHCOAT, ESQUIRE
 BEN WILSON, RISK ADMIN.
 RARE HOSPITALITY
 8215 Roswell Rd., Bldg., 600
 Atlanta, GA 30350

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(Whereupon,

LEIGH CHABOT

was called as a witness, duly sworn to tell
 the truth, and testified under oath as follows:)
 (10:11 A.M.)

EXAMINATION BY MR. FARRAH:

Q. Good morning, Ms. Chabot. My name is Albert
 Farrah and I represent the Plaintiff in this action. How
 do you do?

A. Good.

Q. Could you tell us your full name for the
 record, please?

A. Lee Ann Blackington Chabot, maiden name
 Blackington?

Q. How old are you?

A. Twenty-five.

Q. And are you married?

A. Yes.

Q. Where do you live?

A. Fayetteville, North Carolina.

Q. Do you have any children?

A. Yes, three.

Q. Could you briefly tell me what your schooling
 experience is?

A. I attended high school through 11th grade at

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- 1 Paradise Village Hills Pheonix, Arizona. Later I
- 2 obtained my GED and served -- did one year at Mount
- 3 Monchuset (phonetic) Community College which ended in
- 4 2004.
- 5 Q. Your age again is?
- 6 A. Twenty-five.
- 7 Q. Date of birth is what?
- 8 A. December 17, 1980.
- 9 Q. Can you tell me what experience you have
- 10 working in restaurants?
- 11 A. I began working at J&B's Bar and Grill in
- 12 Townsend, Massachusetts in about May of 1998. I
- 13 hostess'd there for about six months. After that I
- 14 waitressed for the following time I was there, which was
- 15 about three years. And then I moved on to Longhorn
- 16 sometime late 2000 and worked there until April 12, 2004,
- 17 which then I left when I joined the military.
- 18 Q. You joined the military in 2004; is that
- 19 right?
- 20 A. Yes, sir.
- 21 Q. Were you in the Reserves prior to that time?
- 22 A. No, sir.
- 23 Q. When you worked at JMB's, is that the name of
- 24 it with an M in the middle?
- 25 A. No, an "&" sign, J&B's.

1 Q. Oh, J&B's. Okay, when you worked at J&B's,
2 after working as a hostess you worked as a server; is
3 that right?
4 A. Yes, sir.
5 Q. Did you serve alcoholic beverages to
6 customers there?
7 A. Yes.
8 Q. Can you tell me what your training in service
9 of alcoholic beverages was prior to the time you went to
10 work at the Longhorn restaurant in Leominster?
11 A. That would be training I got at J&B's, which
12 was on the floor training where we trained with a
13 trainer. And then we were handed a booklet briefly on
14 bar ethics and bar codes.
15 Q. What kind of a restaurant is J&B's if you can
16 tell me?
17 A. A family dining restaurant.
18 Q. In Townsend; is that right?
19 A. Yes, sir.
20 Q. And you were hired at the Longhorn sometime
21 in the year 2000; is that right?
22 A. Yes, sir.
23 Q. That your best memory?
24 A. Yes, sir.
25 Q. As of September 26, 2003 you were still

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1 following month after I left -- June was his birthday,
2 so he turned four. And my other son was six.
3 Q. So when you joined the service you had a son
4 who just turned four and a son who was six; is that
5 right?
6 A. Yes, sir.
7 Q. It was after September 11, 2001, that you
8 decided you wanted to join the service; is that right?
9 A. I had wanted to before then, and that just
10 put an extra impact on it.
11 Q. It was three years later that you joined the
12 service; is that right?
13 A. Yes, sir.
14 Q. Now, you have another child?
15 A. Yes, sir, I do.
16 Q. Is that a boy or girl?
17 A. She's a girl.
18 Q. How old is she?
19 A. She's nine months.
20 Q. Congratulations.
21 A. Thank you.
22 Q. Do you remember the last day, the date of the
23 last day you worked at the Longhorn?
24 A. I would say -- not positive of the exact date
25 that I left the Longhorn, but I would say it was April

1 working at the Longhorn; is that right?
2 A. Yes, sir.
3 Q. Can you tell me during that period from when
4 you were hired until September 26, 2003 approximately how
5 many days a week you worked at the Longhorn.
6 A. I worked at the least, five days a week,
7 which two of those contained doubles on Saturdays and
8 Sundays.
9 Q. At the most, during that period again, how
10 many days a week did you work?
11 A. At the most it could be seven depending if a
12 shift needed to be picked up or not.
13 Q. When did you get married?
14 A. I got married October 23rd of 1999.
15 Q. Why did you leave the Longhorn?
16 A. I was joining the service.
17 Q. Had you planned to do that for some time?
18 A. I had planned to do that my whole life and
19 then especially situations arising from 9/11 my mother
20 flew that day and had a big impact. As soon as my kids
21 grew up, and it was okay to be with my husband for a
22 period of time, I decided it was time to go.
23 Q. How old were your kids when you joined the
24 service?
25 A. My son would have been -- he turned June the

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1 24th or 25th.
2 Q. 2004?
3 A. Yes, sir.
4 Q. Now, are you represented today by Mr. Gillis?
5 A. Yes, sir.
6 Q. And you've spoken to him prior to today; is
7 that right?
8 A. Yesterday, sir.
9 Q. Had you met him before today? Before
10 yesterday, pardon me.
11 A. Before yesterday, no.
12 Q. Now, once you went to the Longhorn, did you
13 receive any training in the responsible service of
14 alcoholic beverages?
15 A. Yes, sir.
16 Q. Can you tell me where you received that
17 training?
18 A. We received that training at the restaurant
19 before it opened.
20 Q. It was a new Longhorn at Leominster that you
21 went to work at in 2000; is that right?
22 A. Yes.
23 Q. You should try to wait a second just to let
24 me finish my questions before you answer if you could.
25 MR. GILLIS: To just assist you on that, the

1 stenographer can only take down one of you, so if --
 2 he'll, I'm sure, will wait for you to finish your answer
 3 if you could just wait for him to finish his question.
 4 Q. You were trained at the restaurant before it
 5 opened up; is that fair to say?
 6 A. Yes.
 7 Q. Who trained you?
 8 A. There are many trainers from all different
 9 kinds of Longhorns that came in. They are trainers that
 10 travel to each Longhorn before they open and they train
 11 you.
 12 Q. Do you know how long that training lasted?
 13 A. It was extensive training for a week before
 14 the restaurant even opened. And then at least for one
 15 month we had trainers in there on a consistent basis
 16 every shift with us, guiding us through everything we
 17 did.
 18 Q. Okay. Is it fair to say that the training
 19 you received at that time was in not only responsible
 20 serving of alcoholic beverages, but also in just being a
 21 waitress at the Longhorn Restaurant and how the
 22 restaurant operated?
 23 A. Yes.
 24 Q. At some point in time did you become -- did
 25 you receive what's called tips training?

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1 Q. And it's entitled, "Bar Code Server Guide,"
 2 could you take a moment and look at that please and tell
 3 me if you recognize it?
 4 A. (Peruses document.) Yes, I do.
 5 Q. Is this one of the booklets that you received
 6 from Longhorn as part of your tips training -- bar code
 7 training?
 8 A. Yes, bar code training.
 9 MR. FARRAH: Can I get this marked as the
 10 first exhibit please.
 11 (DEPOSITION EXHIBIT #1 WAS MARKED
 12 FOR IDENTIFICATION.)
 13 Q. I am going to show you what has been marked
 14 as Exhibit #2 to Christen's deposition and it is entitled
 15 "Longhorn Steakhouse Bar Recipes, revised 2002." Do you
 16 recognize that document?
 17 A. No, I don't.
 18 Q. Take a moment and look at it.
 19 A. (Peruses document.) No, I don't.
 20 MR. FARRAH: Can we have this marked as
 21 Exhibit #2 please?
 22 (DEPOSITION EXHIBIT #2 WAS MARKED
 23 FOR IDENTIFICATION.)
 24 MR. GILLIS: What number is that from the
 25 prior deposition?

1 A. Tips training I don't specifically remember.
 2 no.
 3 Q. Do you remember receiving anything called bar
 4 code training?
 5 A. Yes.
 6 Q. When did you receive that training?
 7 A. That would have been throughout the first
 8 week that we did training without anybody -- without
 9 having customers yet in the restaurant.
 10 Q. What does bar code mean to you?
 11 A. The bar code is the system that you go by on
 12 determining how you are going to serve someone, how the
 13 serving comes about, systems that they go through
 14 determining when someone's had too much to drink, or
 15 getting close to having too much to drink.
 16 Q. Did you receive some booklets or publications
 17 in connection with that training?
 18 A. Yes.
 19 Q. Do you have them now; do you still keep them?
 20 A. No.
 21 Q. Let me show you some booklets and you tell me
 22 if you recognize them. The first booklet I want to show
 23 you has been marked Exhibit #5 to Christen O'Donnell's
 24 deposition. You know Christen O'Donnell, don't you.
 25 A. Yes, sir.

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1 MR. FARRAH: That was -- It's #2 in both
 2 depositions.
 3 Q. Did you receive at the time you started
 4 working at the Longhorn any document that you understood
 5 contained the recipes for different drinks served at the
 6 Longhorn restaurant?
 7 A. Did I remember receive any?
 8 Q. Yes. Any document that has the recipes for
 9 the different drinks that are served at the Longhorn?
 10 A. No, not that I can remember.
 11 Q. Do you remember receiving any training in
 12 recipes for the different drinks that were served at the
 13 Longhorn at any time prior to September 26, 2003?
 14 A. Yes.
 15 Q. What training was that?
 16 A. It may not necessarily have been training,
 17 but when any new drink came out that we were adding to
 18 the menu, they would tell us what was in it so that we
 19 would know, so we could sell it as a promotion?
 20 Q. Other than that, do you remember receiving
 21 any training from the time you started the Longhorn until
 22 September 26, 2003 about recipes for making different
 23 drinks at the Longhorn?
 24 A. Not necessarily the recipes, exactly what was
 25 in them, but we'd have to know that, you know, in what

1 type of drinks was what alcohol so that if someone
2 ordered vodka and tonic, what kind of vodka would they
3 want with it. We knew the brands of alcohol, what
4 alcohols were in each drink, but the recipes to make
5 them, no.

6 Q. Here is a big one. This is Exhibit #3 to
7 Christen's deposition. It is entitled "Wanted: Longhorn
8 Steakhouse Server and Bartender Trainee Edition." It's
9 about an inch thick. Does that look familiar to you?

10 A. Yes.

11 Q. Does this look like a document that you
12 received at the time you started work at the Longhorn?

13 A. When I started there, yes.

14 MR. FARRAH: Can we have this marked please.
15 Did I say this is Exhibit #3 to Christen's deposition?

16 (DEPOSITION EXHIBIT #3 WAS MARKED
17 FOR IDENTIFICATION.)

18 MR. GILLIS: Yes.

19 MR. FARRAH: It's #3 to Ms. Chabot's
20 deposition.

21 Q. Do you recall other than the two documents
22 you've identified so far and that are exhibits now in the
23 case, any other documents that you received from the
24 Longhorn at the time you first were employed there?

25 A. We received many documents, many booklets,

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1 didn't follow the training guidelines, yes.

2 A. It was zero tolerance.

3 Q. How do you know that?

4 A. That was just standards set forth through
5 Longhorn, and I don't know of any time that anyone had
6 ever had been reprimanded for it.

7 Q. How do you know that that was the standard,
8 zero tolerance that was set forth through Longhorn?

9 A. They made it very clear, did I know it to be
10 a fact, did they do it to anyone, I do not know.

11 Q. How did they make it very clear?

12 A. They spoke to us about it on several
13 occasions. We'd have meetings on Saturday mornings we'd
14 come in, learn about new menu items, any issues that may
15 have come up, and throughout the training in the
16 beginning, made it very clear what our standard was and
17 that we were to live up to that standard.

18 Q. Okay. Did you receive any documents, other
19 than the documents we've identified now, that set forth
20 that zero tolerance policy you've just described from the
21 time you started working at Longhorn until you left?

22 A. Just the documents I have already seen.

23 Q. This ones that are exhibits in the case?

24 A. Yes, sir.

25 Q. And other than the training you received

1 train the trainer guides, thing -- chemical spill, we had
2 to know about in the back, we received that booklet.

3 Q. Any other documents about -- that you recall,
4 relating to serving alcoholic beverages responsibly?

5 A. No, not that I can remember.

6 Q. Let me show you what has been marked as
7 Exhibit #6 to Christen's deposition. This one is the
8 "Longhorn Steakhouse Training Test Booklet for Server and
9 Bartender Team Members." Does that look familiar to you?

10 A. Yes.

11 Q. Does it look familiar as a document that you
12 received about the time you started at the Longhorn?

13 A. Yes.

14 MR. FARRAH: Could we have this marked
15 please.

16 (DEPOSITION EXHIBIT #4 WAS MARKED
17 FOR IDENTIFICATION.)

18 Q. Throughout the time that you were at the
19 Longhorn, did you know of any -- did you know of any
20 policy that the Longhorn had to reprimand employees who
21 did not follow the guidelines set forth in the training
22 documents?

23 A. Such as what would happen to them if they
24 didn't follow it to a T?

25 Q. Such as what would happen to them if they

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1 initially, have you had any -- did you have any
2 retraining from that time until you left the Longhorn in
3 serving alcoholic beverages responsibly?

4 A. Specifically, no.

5 Q. And you were bar code certified at some point
6 in time; is that right?

7 A. Yes, sir.

8 Q. That was fairly early on in your career at
9 the Longhorn?

10 A. Yes, sir.

11 Q. Are there any written policies regarding the
12 service of alcoholic beverages responsibly that you
13 understood were in force at the Longhorn during the time
14 you worked there, that you have not now described to us?

15 A. No, sir.

16 Q. Were there any other verbal policies
17 concerning the responsible service of alcohol that were
18 in place at the Longhorn during the time that you worked
19 there, that you have not told us about?

20 A. Just that the managers, you know, were very
21 confident in us, and that, you know, every case may not
22 be a "by the book" but a very much so a judgment call in
23 our training, that if we felt anything was wrong or okay,
24 that as long as our judgment was fine with it, they were
25 fine with it.

1 Q. The managers told you that; is that right?
2 A. That the managers told us they were fine with
3 it?
4 Q. Yes.
5 A. That they trusted our judgment, that we had
6 judgment calls.
7 Q. Okay, so the managers at the Longhorn told
8 you that really it was up to you whether to serve
9 somebody or not?
10 A. Yes.
11 Q. When you started at the Longhorn, how much
12 were you paid per hour?
13 A. \$2.63.
14 Q. When you left how much were you paid per
15 hour?
16 A. \$2.63.
17 Q. What's the most hours a week you worked at
18 the Longhorn?
19 A. It would vary. The shifts were 5:00 till
20 close, but close may be 11:00 and we might not get out
21 until 1:00. So it could go anywhere 30 to 40 hours a
22 week.
23 Q. When you worked seven days a week, how many
24 hours was the most you worked, if you can recall?
25 A. It was probably 42, maybe at the most.

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1 Q. Yes.
2 A. We stopped serving food on Friday nights,
3 from what I remember, 11:00.
4 Q. What time did stop serving alcohol on Friday
5 nights?
6 A. Usually the bartender would call last call
7 about 20 to 15 minutes before actual closing time.
8 Q. Before 20 to 15 minutes before 11:00?
9 A. Yes, sir.
10 Q. There were some nights that you stayed after
11 closing, at 11:00 until as late as 1:00 you just
12 testified, is that right?
13 A. Yes, sir.
14 Q. What sorts of things did you do between 11:00
15 and 1:00 on those nights?
16 A. You have to check each server out. As a
17 closer you have to check servers out and make sure
18 they've done their side work, make sure they've done
19 everything right on their tables. We have to do the
20 final close down of the alley, which consisting of
21 putting salad dressing away, making sure bread is thrown
22 out, making sure the ice is filled, the whole alley way
23 is ready, and any rolling of silverware that was left to
24 do, we had to do.
25 Q. That was in addition to your waitressing

1 Q. Forty-two did you say?
2 A. Yes, sir.
3 Q. Okay. And some days you worked double
4 shifts, you told us, is that right?
5 A. Yes, they may be doubles, but then you get a
6 lunch break and if it's not busy, they probably let you
7 go from around 11:00 to 3:00, or anywhere from, you know,
8 noon when they notice the rush isn't big until 3:00 or
9 4:00. Then you come back.
10 Q. When -- did you act as your own bus boys,
11 clearing table?
12 A. We bussed 90 percent of the tables. If there
13 were glasses left when the guest left, then the hostesses
14 would clear those.
15 Q. But there were no bus boys working at the
16 Longhorn?
17 A. No, sir.
18 Q. At any time you worked there, is that right?
19 A. Yes, sir.
20 Q. So they hostesses that were on duty also did
21 some bussing functions; is that right?
22 A. Yes, sir.
23 Q. On Friday nights what time did you stop
24 serving?
25 A. Stopped serving food?

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1 functions; is that right?
2 A. Yes.
3 Q. Sort of readying the place for the next day's
4 operation?
5 A. Yes, sir.
6 Q. Is that a fair way to describe that?
7 A. Yes, sir.
8 Q. Were you paid for that?
9 A. No, sir.
10 Q. You weren't paid hourly for that?
11 A. The hours we were on the clock, we were paid
12 for.
13 Q. So tips were an important part of your
14 compensation at Longhorn; is that right?
15 A. Yes, sir.
16 Q. During the time that you worked there, tell
17 me the range per night what you made in tips?
18 A. In a night it can go anywhere from \$40 to
19 \$120, \$130.
20 Q. During the time that you worked at the
21 Longhorn, were there any reviews, I mean official reviews
22 of your performance? Do you know what I mean by that?
23 A. Yes.
24 Q. Were there any?
25 A. Yes, there were.

Q. What shape would they take?

A. Usually they would call you into the office, it was probably at the end of the night, when you were getting ready to leave at the end of your shift, when you're turning in your stuff, and they would go over just a basic review of how you were doing, how your sales were, how your attitude's been.

Q. When you say how your sales were, what do you mean by that?

A. With any promotions that we have, were we selling the promotions, were we suggestively selling, were we adding things on to the meal.

Q. What do you mean by suggestively selling?

A. Were we mentioning the fact that we had a new steak on the menu. Were we mentioning the fact that for \$1.99 they could add a salad.

Q. How did your managers know, if you know, whether or not you were mentioning that for 1.99 people could add on a salad?

A. Specifically, I don't know if they know if I said it, or if the person asked for it. They wouldn't know unless they were standing at my table.

Q. So during the reviews, how frequently -- sorry about that, during the reviews.

How frequently did you receive what you

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the Longhorn who was at the restaurant on September 26, 2003, which was a Friday, was involved in an auto accident the next morning in which two people were killed and two people were injured?

MR. GILLIS: Objection

A. Yes.

Q. At some point in time, did you realize that it was your customer who was -- from the night before who was involved in that automobile accident?

MR. GILLIS: Objection

A. Yes.

Q. How did you come to that conclusion?

A. I believe it was the following night. I had already been home from work, woken up, and I guess probably used the restroom, went back to bed. Our TV was still on, and I had actually seen his picture flash across the screen and just heard, involved in fatal accident, and that was all I caught out of it, and that was all I knew about it.

Q. When you saw the picture flash across the screen, did you recognize the picture of the person you saw?

A. Yes.

Q. Did you recognize him at that time as Jeffrey Southworth?

understood to be official reviews?

A. I would say if I had to guess, maybe once a month.

MR. GILLIS: Okay, for purposes of the deposition, if you have an estimate, that's fine, but we don't want any guessing. We want there to be no guessing on the record. If you don't know, that is fine.

A. I don't know then.

Q. Did you ever see any written reviews of your performance at Longhorn?

A. No, not that I can remember.

Q. Did anyone ever say to you -- any manager at Longhorn ever say to you that he knew how much alcohol -- that is how much in dollar amount of alcoholic beverages you were selling at any particular time?

A. No.

Q. Did the company have the ability to calculate that, that is how much alcohol you were selling at any particular time?

MR. GILLIS: Objection.

A. Yes.

Q. But no one ever spoke to you about it?

A. No.

Q. Now, you realize -- do you realize that we're here today because of an allegation that a customer of

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A. I was not sure of his name, positive of exactly what his name was.

Q. Did you think his name at that time -- at that time, did you think his name was Jeffrey Southworth?

A. From what I knew of it to be, yes.

Q. What was the basis for when the TV image of him flashed across the screen, thinking at that time that his name was Jeffrey Southworth?

A. I just recognized his face from the restaurant.

Q. Did you know his name at the time you saw his picture on the screen?

A. No.

Q. When is the first time you recall seeing Mr. Southworth at the Longhorn?

A. I don't know when the first time would be.

Q. Is it accurate to say that prior to the evening of September 26, 2003, and but prior to the -- I mean, days, weeks or months before September 26, 2003, you had first seen Mr. Southworth at the Longhorn?

A. The first time I ever saw him was at the Longhorn.

Q. That was before September 26, 2003; is that right?

A. Yes.

1 Q. Can you tell me approximately how long before
2 September 26, 2003 it was?

3 A. Approximately, I would say at least four
4 months.

5 Q. And can you tell me with what frequency, that
6 is how many times between that first sighting of him, for
7 lack of a better way to describe it, four months before
8 September 26, 2003, and September 26, 2003, you saw him
9 at the restaurant.

10 A. His frequency I would say approximately would
11 be once a week.

12 Q. Can you describe him to me as he appeared to
13 you back then?

14 A. Back then he was, from what I remember, over
15 six foot, six two, well over 200 pounds. I would say
16 220.

17 Q. What kind of hair cut did he have during that
18 period?

19 A. He had a buzz cut.

20 Q. Buzz cut?

21 A. Yeah.

22 Q. Pretty distinctive looking fellow?

23 A. I wouldn't pick him out from a crowd. He had
24 a thicker build. He wasn't fat. A thicker kind of kid.
25 But he would not stand out to me in a crowd, no.

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1 A. I spoke to Sherry the following day.

2 Q. Tell me what you said to her and what she
3 said to you during that conversation?

4 A. It was -- I basically told Sherry that I had
5 seen him on the news and that he was involved in a fatal
6 accident. And she said, are you sure it was him? I
7 said, Yeah, I'm pretty sure, his picture was up there.
8 And she said, did they say a name. And I said no. And
9 that was about it. She said no, it couldn't have been
10 him.

11 Q. Why did she say no it couldn't have been him?

12 A. Probably too much of a coincidence, you don't
13 think anyone you'd know would be on the news.

14 Q. During that conversation did Sherry say to
15 you that she had waited on him before?

16 A. Yes. They're her regulars.

17 Q. He was one of her regulars; is that right?

18 A. Yes, sir.

19 Q. What do you mean by a regular?

20 A. Someone who you wait on when they normally
21 come in. You would know that was your customer and they
22 may even ask for you instead of even sitting with someone
23 else.

24 Q. Did customers have that ability to ask for a
25 particular waitress, I mean, if the restaurant level of

1 Q. Do you have a memory during that four-month
2 period before September 26, 2003 of having waited on him
3 yourself?

4 A. I may have waited on him one time maybe.

5 Q. Do you know any of the other waitresses at
6 the Longhorn who waited on him during that four month
7 period before September 26, 2003?

8 A. Yes.

9 Q. Who? Who else waited on him during that
10 period?

11 A. Mary Clare did and Sherry did.

12 Q. Mary Clare Fitzgerald?

13 A. I believe, yes.

14 Q. And Sherry?

15 A. Samon.

16 Q. How do you know Sherry Samon waited on him
17 before September 26, 2003?

18 A. Just from memory. I have been friends with
19 Sherry, and from the restaurant seeing him in there, I
20 had known Sherry to wait on him. Usually Sherry and I
21 always work the same shifts.

22 Q. Did you ever, after you realized that there
23 was this accident of September 27 in the early morning of
24 2003, did you speak to Sherry about this gentleman, Mr.
25 Southworth?

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1 business allowed it?

2 A. Absolutely.

3 MR. GILLIS: Objection.

4 Q. What made you understand that Mr. Southworth
5 was Sherry's customer?

6 A. Normally when he came in from the shifts I
7 was on, and that I saw him in the restaurant, Sherry was
8 waiting on him.

9 Q. Did you ever hear him ask for Sherry?

10 A. No, I never heard him ask.

11 Q. Did you ever hear Sherry talk about him
12 during the period prior to September 26, 2003?

13 A. Yes.

14 Q. What sort of things did she say about him?

15 A. She just, you know, she never mentioned him
16 by name, but if she came to the computer and we were

17 sitting there chatting, she would go oh, yeah, those kids
18 are so funny. Or maybe tell me something they were
19 talking about at the table. She mentioned frequently how
20 they'd always come in after dirt biking. And that was
21 their ritual. They would go out dirt biking for the day
22 and then come in for dinner.

23 Q. Can you tell me how many times Sherry waited
24 on Mr. Southworth during that four-month period?

25 MR. GILLIS: Objection.

1 A. No.
2 Q. Do you know any -- strike that. What else
3 did Sherry and you talk about the night of -- excuse me,
4 the next day after you learned there had been this
5 accident?
6 A. That was it. We knew nothing else of what
7 had happened. There was nothing to talk about.
8 Q. At any time up to the time of that
9 conversation, the one where you learned about the
10 accident, after you learned about the accident, did
11 Sherry or you talk about the kinds of drinks that Mr.
12 Southworth liked to drink?
13 A. Between when?
14 Q. Between when you first saw him four months
15 before the accident, and when you learned that he had
16 been involved in the accident?
17 A. Yes.
18 Q. What sorts of conversations did you have
19 about what he liked to drink?
20 A. It wasn't necessarily a conversation, but a
21 comment on the fact of what he drank, because that kind
22 of drink was not typical for the younger guys. Usually
23 guys came in and drank beer.
24 Q. What did he drink?
25 A. He usually drank Manhattans.

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1 A. From what I remember, yes.
2 MR. FARRAH: Thank you. Could we have this
3 marked as the next exhibit.
4 (DEPOSITION EXHIBIT #5 WAS MARKED
5 FOR IDENTIFICATION.)
6 Q. And I'm going to show you Exhibit #10 to Ms.
7 O'Donnell's deposition. Do you recognize Mr. Southworth
8 in that photo as well?
9 A. I recognize this, yes.
10 Q. Do you recognize him in it?
11 A. Yes.
12 MR. FARRAH: Okay. Can we have that marked as
13 the next exhibit.
14 (DEPOSITION EXHIBIT #6 WAS MARKED
15 FOR IDENTIFICATION.)
16 Q. And that's Mr. Southworth?
17 A. Yes.
18 Q. Have you told us everything that Sherry and
19 you talked about in the conversation that -- everything
20 that Sherry and you talked about in the conversation that
21 you had after you realized that he had been in an
22 accident, after September 26, 2003?
23 A. Yes, from what I remember.
24 Q. Did you talk to Sherry at all during that
25 conversation about how much Mr. Southworth had had to

1 Q. Jack Daniels Manhattans?
2 A. Yes, sir.
3 Q. Sherry knew that?
4 A. Yes.
5 Q. Because she served him Jack Daniels
6 Manhattans, is that right?
7 A. I would say so, yes, sir.
8 Q. What else did he like to drink?
9 A. As far as I know?
10 Q. Yes.
11 A. The Jack Daniels Manhattans.
12 Q. That was after dirt biking, is that right?
13 A. Yes, sir.
14 Q. I am going to show you what has been marked
15 as Exhibits #9 to Christen's deposition and ask you if
16 you recognize that fellow?
17 A. Yes, I would say I do.
18 Q. Is that Mr. Southworth?
19 A. I believe so, yes.
20 Q. You saw him at the restaurant on September
21 26, 2003?
22 A. Yes.
23 Q. That is the fellow who's image flashed across
24 the television screen that early morning after the
25 accident?

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1 drink at the restaurant?
2 A. Not that I remember, no.
3 Q. Was there any conversation with Sherry that
4 you recall during that first telephone call about --
5 A. It was in person that Sherry and I talked.
6 MR. GILLS: Objection.
7 Q. So it wasn't a telephone call that you had
8 with Sherry when you talked about Mr. Southworth being
9 the fellow who'd driven the car?
10 A. Not from what I remember, it was in person at
11 our next shift, that following Sunday.
12 Q. During that -- and it was Sunday is your best
13 memory of when that conversation occurred?
14 A. Yes, because it was the following night after
15 it happened, so it would have been Saturday night. My
16 next shift would have been Sunday.
17 Q. Just so we are on all of the same page here.
18 September 26, 2003 was a Friday?
19 A. Yes. And I didn't see it that night.
20 Q. Did you work the next day, do you know,
21 September 27, 2003?
22 A. The next day shift?
23 Q. Or night.
24 A. I do not remember if I did, but it is
25 probably that I did.

1 Q. And you don't recall while you were working
2 at the restaurant on Saturday the 27th, be it day or
3 night, any conversation with anyone about Mr. Southworth;
4 is that right?
5 A. Correct.
6 Q. You didn't know as of Saturday, September
7 27th, that there had been this accident; is that right?
8 A. Correct.
9 Q. It was in the evening between Saturday night
10 and Sunday morning, September 27th and September 28th
11 that you saw on TV the picture of Mr. Southworth; is that
12 right?
13 A. Yes, sir.
14 Q. You spoke to Sherry Sunday, the 28th about
15 him; is that right?
16 A. Yes, sir.
17 Q. During that conversation was there any
18 discussion about where else besides the Longhorn Mr.
19 Southworth had been drinking on the night of September
20 26, 2003?
21 A. No, sir.
22 Q. During that -- Have you told us everything
23 you can recall now about that conversation with Sherry?
24 A. Yes, sir.
25 Q. As of the time you had that conversation with

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1 A. I guess when things started stirring up up
2 there, and she was getting calls about a deposition and
3 it was asked because Longhorn and RARE were trying to
4 contact me, and they were asked if they could have a
5 contact number, and I told Sherry that was fine. That
6 was it, and then when it came deposition time, Sherry was
7 just nervous about giving her deposition. Didn't like
8 driving into Boston.
9 Q. Had she talked to you about the deposition
10 beforehand?
11 A. Just that she was didn't like driving into
12 Boston alone.
13 Q. Did she talk to you after the deposition?
14 A. I have talked to Sherry -- not that day after
15 the deposition, but I have talked to Sherry since her
16 deposition, yes.
17 Q. What did she tell you about the deposition?
18 A. She hasn't told me much. We talk about --
19 Q. What did she tell you?
20 A. She said she went in and gave her deposition.
21 She was glad that it was over, and we talked about other
22 things.
23 Q. The people that -- so have you now told us --
24 sorry about that. Strike "the people that."
25 Have you now told us about everything that

1 Sherry, had you spoken to anybody else other than your
2 husband about the fact that Mr. Southworth had been
3 involved in this automobile accident?
4 A. No, sir.
5 Q. Had you spoken, as of the time of the Sherry
6 conversation, on the 28th, with anybody else about the
7 fact that Mr. Southworth had been your customer on the
8 26th?
9 A. No, sir.
10 Q. From the date of that conversation with
11 Sherry 9/28/03 until today, have you talked about Mr.
12 Southworth with Sherry at all?
13 A. Not Mr. Southworth specifically, no.
14 Q. Have you talked about how much in the way of
15 alcoholic beverages he was served that night with Sherry
16 at all?
17 A. No, not particularly.
18 Q. How about at all?
19 A. No.
20 Q. What do you mean by not particular?
21 A. That wasn't a particular part of the
22 conversation, alcohol he was served?
23 Q. What did you talk to Sherry about as it
24 related to this accident since the original conversation
25 since September 28, 2003?

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1 Sherry and you have ever discussed about Jeffrey
2 Southworth and the fact that he was a customer of the
3 Longhorn that was involved in an automobile accident the
4 morning of September 27, 2003?
5 A. Yes.
6 Q. You've told me everything?
7 A. Yes.
8 Q. Okay. Earlier on today you mentioned that
9 there was -- you mentioned that there were some folks or
10 people that Southworth was with during that four-month
11 period that he would come in with. Do you recall that?
12 A. I don't recall saying that, but yes, he
13 usually came in with other people.
14 Q. Quantify for me the largest number of people
15 you ever saw him come in with during that period.
16 A. The largest amount of people I've ever seen
17 him come in with was the amount of people he was in the
18 night I served him.
19 Q. Prior to that, what was the largest number of
20 people you saw him come in with?
21 A. From what I recall, three.
22 Q. Did you ever see Mr. Southworth drinking
23 alcoholic beverages of any kind at the bar, as opposed to
24 as a restaurant pat -- restaurant table patron?
25 A. No.

1 Q. And I mean to ask that question for -- from
2 when you first saw him four months before September 26,
3 2003 until September 26, 2003, did you ever see him
4 drinking at the bar?
5 A. No.
6 Q. After -- So -- strike that. Was Sherry the
7 first person you talked to about Southworth after you
8 realized he was the one driving the car, other than your
9 husband?
10 A. Yes. Other than my husband, yes.
11 Q. Who was the next person you talked to about
12 Southworth after speaking to Sherry?
13 A. From what I can remember, it was our manager,
14 and one of the state troopers that came in inquiring
15 about it.
16 Q. Okay. When was that conversation in relation
17 to the Sunday, September 28th conversation with Sherry?
18 A. I am not positive how far apart they were.
19 Q. Are we talking weeks?
20 A. I would say longer.
21 Q. So is it accurate to say that although or
22 once you realized Southworth had driven the car that had
23 caused this accident on the morning of September 27,
24 2003, it was only Sherry and your husband that you
25 voluntarily engaged in conversations with about it?

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1 Q. Can you characterize for me, if you had one,
2 what your emotion was when you learned that he had some
3 involvement in this accident?
4 A. Slight concern. You never want to see a
5 person injured or someone injure someone else, so there
6 was concern, but upset, no.
7 Q. Did you know that two people had died in that
8 accident?
9 A. No.
10 Q. Did you know that anybody had been injured in
11 that accident?
12 A. Someone was injured. It said fatal accident,
13 so someone had died. How many, who, no, I did not know.
14 Q. Is it accurate to say that you didn't seek
15 out any of that kind of information until you spoke to
16 the state trooper and your manager?
17 MR. GILLIS: Objection.
18 A. I did not seek it out. I was told.
19 Q. So you never sought -- is it accurate to say
20 that you never sought out additional information about
21 the extent of injuries caused by that accident?
22 A. Correct.
23 Q. Chuck was your manager who came to you with
24 the state trooper; is that right?
25 A. No.

1 MR. GILLIS: Objection
2 A. I did not know he drove the vehicle and was
3 involved in an accident. The only thing I knew was his
4 face and involved in fatal accident.
5 Q. Did you not, once you saw his face, and once
6 you saw he was involved in a fatal accident, did you not
7 make any effort to seek out more information about what
8 his involvement was in that accident?
9 MR. GILLIS: Objection.
10 A. No, I did not.
11 Q. Why was that?
12 A. He was not a close friend of mine. He is not
13 someone I knew, so it is not something I would seek out.
14 I would have no reason to.
15 Q. Did you not want to know what his involvement
16 was?
17 MR. GILLIS: Objection.
18 A. No.
19 Q. Were you afraid of what his involvement was
20 in the accident?
21 A. Not at all.
22 Q. Were you upset when you spoke to Sherry about
23 the fact that you had learned he had been involved in an
24 accident?
25 A. Upset, no.

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1 Q. Who was your manager that came to you at the
2 station?
3 A. From what I remember, the manager that was
4 there the day the trooper came was Chris.
5 Q. Chris Orr?
6 A. Yes, sir.
7 Q. What was Chris's job at the Longhorn, do you
8 remember?
9 A. Chris held a couple managerial positions
10 while he was there. He was a manager the whole time, but
11 he was over the kitchen at one time and over the bar at
12 one time.
13 Q. Was he working the night of September 26,
14 2003?
15 A. I can't remember.
16 Q. At some point in time you signed a statement
17 for the police; is that right?
18 A. Yes, sir.
19 Q. I am going to show you what has been marked
20 as the Grand Injury Exhibit #20 dated November 5, 2003.
21 That's the date of the exhibit. The document is dated
22 November 2, 2003, do you recognize it?
23 A. Yes.
24 Q. That is your signature?
25 A. Yes, sir.

Q. And that's your handwriting?

A. Yes, sir.

MR. FARRAH: Could we have that marked as the next exhibit, please.

(DEPOSITION EXHIBIT #7 WAS MARKED FOR IDENTIFICATION.)

Q. So at the time you were living on Fourth Street in Leominster; is that right?

A. Yes, sir.

Q. This document is dated -- Exhibit #7 to your deposition, Ms. Chabot, is dated November 2, 2003. Do you see that?

A. Yes, sir.

Q. Was that the date that Chris and you and the state trooper had this meeting you described earlier?

A. Yes.

Q. Tell me everything you recall about that meeting.

A. The only --

MR. GILLIS: Objection.

A. -- thing I recall about that meeting is at first the trooper and Chris were interviewing another server that they had assumed to be the server that night. And when I heard -- when I overheard what they were speaking about, I realized that it was me because of me

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A. She must have, if it was her.

Q. Do you know why Chris thought it was Jessica?

A. No, I do not.

Q. So during this conversation that you somehow overheard, you were eavesdropping, to use your word, if you don't mind.

A. No, that's fine.

Q. Okay, you realized it was you that had served them that night; is that right?

A. Yes, sir.

Q. And you told Chris this; right?

A. Yes.

Q. And then Chris did something with some checks you said, what did he do?

A. He didn't do anything with checks. He went back and he looked through checks and whatever documentation they have as managers, to find these things out. When he pulled the check and the night that it happened, Chris can look up and see what night it happened and see who they believe waited on them. And when he came up with the check that he believed to be their's, my name was on it.

Q. And he brought that out?

A. Yes, sir.

Q. And then Chris, the trooper, and you had a

1 serving him Friday and then knowing that I saw him on the
2 news the following night. So I pulled Chris aside and I
3 said, Chris, I believe it was me who served him that
4 night. And from there Chris kind of investigated a
5 little bit, looked into checks and so forth and found out
6 it was myself who served him. And so then we sat down,
7 the trooper briefly told us that he was involved in an
8 accident, two people had been killed and that he needed a
9 statement pertaining to anything that happened that
10 night.

Q. What makes you say that the trooper and Chris were interviewing the server they assumed to be the person who served Southworth that night?

A. Because I was eavesdropping. I was listening in on what they were talking about.

Q. What were they saying?

A. They were asking was he in here? If Jessica remembered serving him, and at that time she was saying that she did, but she didn't think it was then. The dates weren't matching up, and that's what made me assume that it was the night that I had thought it was.

Q. Jessica's last name is what?

A. I don't remember Jessica's last name.

Q. So Jessica had served Southworth before at some point in time at the Longhorn; is that right?

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1 conversation; is that right?

A. Yes.

Q. I am going to show you a document and ask you if you recognize it?

A. Yes, I do.

MR. GILLIS: For the record, it's multiple pages. If you wouldn't mind, Mr. Farrah, just break it down. It's actually two documents. Ask her if she recognizes each one individually.

Q. Take a look at the whole document I have shown you first.

A. Yes, I do.

MR. FARRAH: Can we have this marked as the next exhibit.

(DEPOSITION EXHIBIT #8 WAS MARKED FOR IDENTIFICATION.)

Q. Does Exhibit #8 look like what Chris brought out for you and the state trooper to look at that night?

MR. GILLIS: Which part of it?

A. The only part of it that Chris brought out to show us was the check portion.

Q. Okay. Tell me everything you can recall you said, Chris said, and the trooper said in the order it was said, once Chris brought the check portion out that day?

1 A. The only thing I recall being said is the
2 trooper asked me what I can remember of what I served
3 him, what the table ate, what he ate, and Chris and the
4 trooper -- the trooper asked me to write a statement and
5 I wrote a statement while the trooper and Chris had their
6 own separate conversation.
7 Q. And other than what has been marked as
8 Exhibit #7 I think it is, yeah, Exhibit #7 to your
9 deposition, have you ever written another statement to
10 anyone about the events of that night?
11 A. No, sir.
12 Q. Have you written any report for RARE
13 Hospitality or that employer?
14 A. No, sir.
15 Q. Did you give a recorded statement to anyone
16 at any time about this event?
17 A. No, sir.
18 Q. Have you met with any investigators to talk
19 about this event?
20 A. No, sir.
21 Q. Now Mr. Southworth had been your customer on
22 occasions prior to September 26, 2003; is that right?
23 A. No, maybe one occasion.
24 Q. Is it yes, maybe one occasion?
25 A. Yes, maybe one occasion.

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1 A. Yes, sir.
2 Q. When Sherry served him, how were they served
3 to him?
4 MR. GILLIS: Objection.
5 Q. If you know?
6 A. I don't recall.
7 Q. I am going to show you a photograph I
8 represent to you I took with the assistance of Mr.
9 Gillis.
10 MR. GILLIS: Objection
11 Q. Ask you if you recognize anything in that
12 photograph?
13 A. I recognize all of the glasses.
14 Q. And do you recognize those as glasses used at
15 the Longhorn Steakhouse?
16 A. Yes.
17 Q. Are there straight up glasses in that
18 photograph?
19 A. Yes
20 Q. And those are the straight up glasses that
21 Manhattans are served in; is that right?
22 A. Yes.
23 MR. FARRAH: Could we have this marked as the
24 next exhibit?
25

1 Q. Okay. And he'd had Jack Daniels Manhattans
2 on that occasion; is that right?
3 A. From what I remember, yes.
4 Q. On the night in question September 26, 2003
5 he was served those Manhattans straight up; is that
6 right?
7 A. No, sir.
8 Q. How was he served those Manhattans on that
9 night?
10 A. From what I remember, it was in a rocks
11 glass.
12 Q. Have you spoken to Christen O'Donnell about
13 how those Manhattans were served to him that night?
14 A. No.
15 Q. Do you know what she has testified to as to
16 how they were served to him that night?
17 A. Yes.
18 Q. What has she testified to?
19 A. From what I have been told she's testified to
20 is that they were in a tall Martinee glass.
21 Q. Straight up?
22 A. Yes.
23 Q. But that's not your memory?
24 A. No, sir.
25 Q. Your memory is on the rocks?

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1 (DEPOSITION EXHIBIT #9 WAS MARKED
2 FOR IDENTIFICATION.)
3 MR. GILLIS: Let's put on the record too, the
4 assistance that you're referring to is that we allowed
5 you to take photographs of the restaurant, not that we
6 were actually photographing with you.
7 MR. FARRAH: You held the door open for me.
8 Q. I want to show you another photograph and ask
9 you if it fairly and accurately depicts a portion of the
10 Longhorn Restaurant as it appeared to you on the night of
11 September 26, 2003?
12 A. I would say, no.
13 Q. Do you recognize in the photograph that I
14 have shown you, any glassware that was employed at the
15 Longhorn Steakhouse as of September 26, 2003? By
16 employed I mean used.
17 A. Yes.
18 Q. What glassware is that?
19 A. The snifter behind the large Texas margarita
20 glasses.
21 Q. Are the blue glasses in that photograph the
22 Texas margarita glasses you referred to?
23 A. Yes.
24 MR. FARRAH: Could we have that marked as
25 the next exhibit.

(DEPOSITION EXHIBIT #10 WAS MARKED
FOR IDENTIFICATION.)

Q. Do you recognize Exhibit #10 as depicting a portion of the service bar at the Leominster Longhorn as it appeared on September 26, 2003?

A. I don't remember the corkboard being there.

Q. Okay. Other than that does it look like a portion of the service bar?

A. Yes.

Q. I am going to show you a photograph and ask you if it fairly and accurately depicts a portion of the Leominster Longhorn as it appeared on September 26, 2003?

A. Yes.

Q. What portion does that show?

A. It shows the back alley where we receive our food, the dish pit, and a small portion of the left side where we make our drinks and put bread in.

MR. FARRAH: Could we have that marked as the next exhibit.

(DEPOSITION EXHIBIT #11 WAS MARKED
FOR IDENTIFICATION.)

MR. GILLIS: When are we going to get copies of these? I believe you said we were going to get the video and all the photographs that you took.

MR. FARRAH: Did you get an e-mail -- can we

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Q. Did he have any beers that you recall at the table?

A. Not that I recall.

Q. Do you know who had the beers at the table?

A. I know that I served a beer to a gentleman who was in a black hat with black hair.

Q. And you served another beer to that table during that night; isn't that right?

A. Yes, sir.

Q. Who did you serve that too?

A. I don't recall specifically, sir.

Q. So the two beers that appear on the first page of Exhibit #8, two 25 ounce Bud Light beers were served by you to the table the night of September 26, 2003; is that right?

A. Yes, sir.

Q. Nobody from the bar, no bartender that night asked you to add to your check any beers that had been ordered by your table patrons while they had been at the bar that night; is that right?

A. Correct.

Q. And the state trooper was the only police officer you ever spoke to about this incident?

A. Yes, sir.

Q. Did you ever speak to Chuck Bulgain about

go off the record.

(Off the record.)

(Back on the record as follows:)

BY MR. FARRAH:

Q. Could you show us where you get the food?

A. (Indicating while testifying.) Right here we get the main entrees. Up here is where we get appetizers and we pull our salads from there.

Q. All right. Did you testify before the Grand Jury?

A. No, sir.

Q. Did you speak to any other police after that meeting with the police at the Longhorn on November 2, 2003?

A. No, sir.

Q. In Exhibit #7 you wrote among other things -- well, you wrote there were about eight men. They all had chowder and bread. Then they had salads. Most had steaks or ribs. They were drinking Manhattans or Bud Light draft. They had three Manhattans. Do you see that?

A. Yes, sir.

Q. And the he you are referring to there is Mr. Southworth; is that right?

A. Yes, sir.

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this incident?

A. Not that I recall, no.

Q. David -- not David Orr -- what's his first name?

A. Chris.

Q. Chris Orr and you spoke about it that day, is that right?

A. Yes, sir.

Q. Tell me everything you said to Chris and Chris said to you that day about Southworth and what happened that night?

A. Chris asked me after speaking with the state trooper, Chris basically knew exactly what had happened, and so I spoke with Chris later that evening. He told me what the trooper had told him regarding that there was an accident he was involved in. That he had killed two people and that they were backtracking his story for the night. And from what Chris was told from the trooper, the only thing Chris knew is that they had stopped at, I guess a strip club after Longhorn. And Chris asked me do I feel that they left here they were fine, that they were not over served. And I told him I believed they did. They left the restaurant fine.

Q. Have you told everything you recall about talking to Chris about that night?

1 A. Yes.

2 Q. Have you spoken since that conversation with

3 anybody in management at Longhorn about what happened

4 that night?

5 A. Not that I recall.

6 Q. Has anybody from management sought you out to

7 speak to you about what happened that night?

8 A. No.

9 Q. Has Mr. Wilson who is here today sought you

10 out to speak about what happened that night?

11 A. No, sir.

12 Q. Has anyone on his behalf sought you out?

13 MR. GILLIS: Objection.

14 A. No, sir.

15 Q. You have spoken to lawyers representing RARE;

16 is that right?

17 A. Yes, sir.

18 Q. Has Mr. -- I don't want to know what you

19 spoke to -- what you said to one another, but is Mr.

20 Gillis the first lawyer you spoke to representing RARE

21 about what happened that night?

22 A. Yes.

23 Q. Did you ever speak to any lawyers from the

24 Campbell Law Office in Boston?

25 A. I know I spoke to someone representing RARE,

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1 about that evening ask you why you permitted to be placed

2 orders for that number of drinks?

3 MR. GILLIS: Objection. I instruct you not

4 to answer.

5 MR. FARRAH: Other than attorneys?

6 MR. GILLIS: I am still -- who specifically,

7 because if it's management and if it's in anticipation of

8 preparation for trial, I think it's privileged.

9 MR. FARRAH: I don't think she's told us that

10 she's spoke to one person at RARE management other than

11 Chris Orr that night.

12 MR. GILLIS: Why don't you ask the question

13 again, maybe I misunderstood.

14 Q. Did any employee at RARE ask you why you

15 permitted to be placed orders for that number of drinks

16 during that time period?

17 MR. GILLIS: Non-management employees?

18 Q. Non-management.

19 A. While I was ordering them?

20 Q. No, at any time?

21 A. No.

22 Q. Other than Sherry, have you talked to anybody

23 -- Sherry and your husband -- Sherry and your --

24 Other than Sherry, have you spoken to any --

25 and Chris, have you spoken to any RARE employee about

1 what their name was I don't recall. And then I know that

2 I was handed over to Neil and Mr. Gillis.

3 Q. Obviously you've spoken to Neil in the past?

4 A. Yes, sir. Yes.

5 Q. Even before yesterday; is that right?

6 A. Yes.

7 Q. Now, are you aware of the fact that you

8 placed orders for 17 Jack Daniels Manhattans and two 25

9 ounce beers for this table in the time between 8:40 p.m.

10 and 9:24 p.m.?

11 MR. GILLIS: Objection.

12 A. I am aware that I served that many drinks.

13 The time frame exactly sounds about right.

14 Q. And can we agree that between 8:40 p.m. and

15 9:24 p.m. is 44 minutes?

16 A. Yes, sir.

17 Q. And are you aware that you served 17 Jack

18 Daniels Manhattans and two 25 ounce beers in that

19 44--minute period?

20 A. Yes.

21 Q. Did any police officer ask you why you

22 permitted to be placed that magnitude of orders?

23 MR. GILLIS: Objection.

24 A. No, sir.

25 Q. Did any employee with whom you spoke at RARE

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1 this night?

2 A. No.

3 Q. No one?

4 A. No.

5 VIDEOGRAPHER: We need to go off the

6 record to change the tape.

7 (Off the record.)

8 (Back on the record as follows:)

9 BY MR. FARRAH:

10 Q. So other than Chris, have you ever spoken to

11 any management at RARE about the night in question?

12 A. No.

13 Q. And have you told us everything you can

14 recall about the conversation you had with Chris about

15 whether or not it was okay to serve Mr. S -- it was

16 appropriate to serve Mr. Southworth alcoholic beverages

17 that night?

18 A. It wasn't that if it was appropriate. the

19 asked me on my judgment call, did I think the was fine

20 when they left and I told him yes.

21 Q. What did you base that on?

22 A. I based it on Mr. Southworth's appearance,

23 how the seemed to me, how the whole table was acting.

24 Q. The table was acting well?

25 A. Yes.

1 Q. Not loud?
2 A. No.
3 Q. Had you ever seen him prior to that night,
4 Mr. Southworth, in a state that you considered to be
5 intoxicated?
6 A. No.
7 Q. Had you ever seen him prior to that night --
8 had you ever seen any of his people that were with him
9 prior to that night in a state that you considered to be
10 intoxicated?
11 A. No.
12 Q. Had you ever seen the fellow with the black
13 hair and the black hat that you served the beer to prior
14 to that night?
15 A. Not that I recall, no.
16 Q. Is Friday night one of the busiest nights of
17 the week at the restaurant?
18 A. Yes.
19 Q. Is the time between 8:00 and 10:00 p.m. the
20 busiest time of the night?
21 A. I would say between 6:00 to 10:00.
22 Q. Was it busy that night?
23 A. I don't recall how busy it was that night.
24 Q. Do you know how many tables you were waiting
25 on that night?

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1 (DEPOSITION EXHIBIT #12 WAS MARKED
2 FOR IDENTIFICATION.)
3 Q. Would you mark on this exhibit in pen, tables
4 52 and you said 62?
5 A. Yes.
6 Q. Is that right?
7 A. Yes. (Complies.)
8 Q. May I see it. Could you mark for me the
9 numbers of the tables that are -- as you're looking at
10 it, to the right of 62, the next table and then the table
11 after that, just what those are?
12 A. (Complies.)
13 Q. And those were 72 and 82; is that right?
14 A. Yes, sir.
15 Q. What other two tables did you have that
16 night?
17 A. I don't recall but usually the section that
18 it would be, it would most likely be these two booths, 41
19 and 51.
20 Q. Your -- the second page of Exhibit #7-- #8,
21 pardon me, Exhibit #8 indicates that you had table 63; do
22 you see that?
23 A. Yes.
24 Q. And where is table 63?
25 A. 63 would be right here.

1 A. From what I recall, I had four table section
2 that night.
3 Q. You had a four table section?
4 A. Yes, sir.
5 Q. You've have looked at pages other than the
6 first page of Exhibit #8; isn't that right?
7 A. Yes, sir.
8 Q. And was the Southworth -- was the table that
9 Mr. Southworth was at a double table?
10 A. It was two tables pushed together with the
11 leaves pulled out.
12 Q. Do you know what two numbered tables were
13 pushed together that night?
14 A. From what I recall it was 52 and 62.
15 Q. 52 and 62?
16 A. Yes, sir.
17 Q. And I am going to show you a document called
18 proposed floor plan, Leominster, Mass Longhorn that I
19 will represent to you, I got it from the Leominster
20 licensing board commission. And ask you if it looks like
21 a floor plan of the restaurant as it appeared on the
22 night of September 26, 2003?
23 A. Yes, it does.
24 MR. FARRAH: Could we have that marked as
25 the next exhibit, pleas.

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1 Q. Would you mark 63 there for me please.
2 A. Yes. (Complies.)
3 Q. And the second page of Exhibit #7 [sic] also
4 indicates that you had table 53. Do you see that?
5 A. Yes.
6 Q. Could you mark table 53 for me?
7 A. (Complies.)
8 Q. Is that your best memory, 52, 62, 53, 63 of
9 the tables you had that night?
10 A. Yes, sir.
11 Q. Is any of the activity with regard to the
12 party that Mr. Southworth was with that night, the others
13 in his party, is any of that activity reflected on a
14 check specific to table 62, if you know?
15 A. The check prior on here to 62?
16 Q. No, no. You served Mr. Southworth and his
17 party that night; is that right?
18 A. Yes.
19 Q. Okay. And the first page of Exhibit #8 is a
20 check; is that right?
21 A. Yes.
22 Q. That is a check, and the table number on that
23 check is 52/1; do you see that?
24 A. Yes.
25 Q. What I want to know is, is it your belief

1 that the first page of Exhibit #8, the check table 52/1
 2 was the only check you delivered to Mr. Southworth and
 3 his party the night of September 26, 2003?
 4 A. Yes, this is the only check I gave them.
 5 Q. Is there any particular reason why you
 6 indicated on the top of it, table 52/1?
 7 A. I would not indicate the /1. The only thing
 8 that I would assume that came from is when you have two
 9 tables put together you can highlight --
 10 MR. GILLIS: Again, I'm going to object. If
 11 you have an answer. I don't want you to assume anything.
 12 MR. FARRAH: Right. I don't either.
 13 A. Then I don't know why it would say /1.
 14 Q: Now, at that time, as of September 26, 2003,
 15 did Longhorn have any policy in place preventing a
 16 customer at a table from getting up and buying a drink at
 17 the bar?
 18 A. I don't know of a specific policy they had in
 19 place, no.
 20 Q. Who was the manager on duty that night?
 21 A. I don't recall.
 22 Q. Is there -- do you have any memory of whether
 23 or not -- strike that.
 24 Did you see Mr. Southworth before the came to
 25 your table that night?

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1 A. No.
 2 Q. That night did you try to find out what he
 3 had at the bar before he became your customer?
 4 A. No.
 5 Q. Did anyone at the bar that night tell you
 6 prior to or after he became your customer at the table
 7 what Mr. Southworth had to drink at the bar that night?
 8 A. No.
 9 Q. Does RARE have a policy -- did RARE have a
 10 policy in place at that time obligating bartenders to
 11 tell waitresses how much their customers had to drink at
 12 the bar prior to becoming customers at tables?
 13 A. It was not a set in policy.
 14 Q. Were there any systems in place at the
 15 Longhorn as of September 26, 2003 for monitoring how many
 16 drinks a customer had been served?
 17 A. No.
 18 Q. Was there any practice in place at the
 19 Longhorn as of September 26, 2003 for monitoring how many
 20 drinks a customer had been served?
 21 A. The bartenders would monitor on their own.
 22 If they had any concerns they would certainly let us
 23 know.
 24 Q. You are speculating about that; is that
 25 right?

1 A. Anywhere in the restaurant?
 2 Q. Yes, ma'am.
 3 A. No.
 4 Q. Do you know whether he was waiting at the bar
 5 before the came to the table?
 6 A. Yes.
 7 Q. How do you know that?
 8 A. Because I knew they were getting my two
 9 tables ready for a party, and they said half of them are
 10 at the bar waiting for the other half.
 11 Q. Who told you that?
 12 A. The hostess.
 13 Q. Did you know it was Mr. Southworth that was
 14 at the bar waiting?
 15 A. Not specifically, no. At that time no.
 16 Q. Do you know what he had to drink at the bar
 17 that night before the became your customer?
 18 A. No.
 19 Q. Has anyone ever told -- other than lawyers or
 20 Chris Orr, has anyone ever told you what he had to drink
 21 at the bar before the became your customer?
 22 MR. GILLIS: Objection
 23 A. No.
 24 Q. Have you tried to find out what he had to
 25 drink at the bar before the became your customer?

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1 A. No.
 2 Q. Was there any official practice, Longhorn
 3 sanctioned practice in place as of September 26, 2003
 4 that required bartenders to tell waitresses what
 5 customers had had to drink at the bar prior to becoming
 6 waitresses -- waitress customers?
 7 MR. GILLIS: Objection. Under what
 8 circumstances?
 9 MR. FARRAH: Any circumstances.
 10 A. I would not know. I wasn't a bartender.
 11 Q. Did any bartender ever tell you the entire
 12 time you worked at the Longhorn what a customer that had
 13 been at the bar that because a table customer of yours
 14 has had to drink?
 15 A. Not that I recall, specifically.
 16 Q. Was there any requirement at the Longhorn in
 17 place as of September 26, 2003 that you knew of,
 18 requiring bartenders to share with waitresses the amount
 19 of alcoholic beverages that a customer had had to drink
 20 at the bar prior to becoming a customer at a table of
 21 that waitress?
 22 MR. GILLIS: Objection. Under all
 23 circumstances or every time they went to a table or --
 24 MR. FARRAH: Any circumstance.
 25 Q. Any procedure you knew of?

1 A. Written procedure?
2 Q. Any kind of procedure?
3 MR. GILLIS: Are you talking procedures now
4 or practices, what was common practice or just procedure.
5 MR. FARRAH: Procedure is what I've asked
6 her.
7 MR. GILLIS: No, you've asked written policy.
8 You've asked procedures, you've asked practices.
9 MR. FARRAH: This question is procedure.
10 A. Procedure, if a bartender thought one of her
11 customers should not have another drink and they were
12 sitting at a table to eat, the waitress would tell us.
13 Q. The waitress would tell you?
14 A. The bartender, excuse me.
15 Q. No bartender ever told you that; isn't that
16 right?
17 A. Me specifically --
18 Q. Yes.
19 A. -- no.
20 Q. And the basis for saying this was a procedure
21 at the Longhorn is what?
22 A. I didn't say it was a procedure. The
23 bartender would do it at their on discretion.
24 Q. What is the basis for you to offer that
25 testimony?

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1 that right?
2 MR. GILLIS: Objection.
3 A. That was not my best memory. It was at the
4 time, you know, there were nights where you didn't throw
5 the correct amount of guests in the screen. And if maybe
6 only six were there at the time, but more joined them
7 later, it wasn't uncommon not to change the guest amount.
8 Q. But you are purely speculating about six were
9 there at the time and then more joined them later, when
10 you make that answer; isn't that true?
11 MR. GILLIS: Objection.
12 Q. Isn't that true?
13 A. Am I speculating that there were six at the
14 time I put it in?
15 Q. Yes. No. Are you speculating that the
16 explanation for why you have written there are six
17 people, why you entered that there were six people on the
18 check is that because six were there at the time when
19 they first sat down and then others came?
20 A. Yes, that could have been a reason.
21 Q. But that's pure speculation on your part,
22 isn't it?
23 MR. GILLIS: Objection.
24 A. Yes.
25 Q. You don't have any memory of that happening,

1 A. Because I have heard bartenders say it to
2 other servers.
3 Q. What?
4 A. By the way, that customer you just had -- had
5 three beers at the bar, an FYI to inform the waitress so
6 that she could keep a closer eye on them, if need be.
7 Q. Now, did you ask to see identification for
8 anyone at the Southworth table the night in question, age
9 identification?
10 A. Specifically that was my policy. I would say
11 I did.
12 Q. How many people were in that party?
13 A. From what I recall, seven.
14 Q. Now, the statement you gave to the -- the
15 statement you gave to the police officer on September
16 --excuse me, November 2, 2003 was that there were eight
17 people at the table; is that right?
18 A. Yes, sir.
19 Q. That was your best memory then; is that
20 right?
21 A. Then, yes.
22 Q. And the check that you opened the night in
23 question said there were six people; isn't that right?
24 A. Yes.
25 Q. And that was your best memory then; isn't

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1 do you?
2 A. No.
3 Q. It was your custom to accurately reflect the
4 time you opened the check, the number of people who were
5 seated at the table; isn't that right?
6 MR. GILLIS: Objection.
7 A. That's what we were supposed to do.
8 Q. Okay, and you tried to do what you were
9 supposed to do while you worked at the Longhorn; isn't
10 that right?
11 MR. GILLIS: Objection.
12 A. Yes.
13 Q. And you've looked now at the check?
14 A. Yes.
15 Q. Isn't that right? And you realized that
16 there were six meals that were served to that table;
17 isn't that right?
18 MR. GILLIS: Objection. Can I put a running
19 objection so I don't have to say it every time, but you
20 know, it's your direct witness, and so that I don't have
21 to object every time on the record and interrupt the flow
22 of your questions, I just want on the record where it's a
23 direct witness and my belief you don't have the right to
24 ask leading questions. So if you're going to continue to
25 ask the leading questions, I am going to have a running

1 objection to that affect.

2 MR. FARRAH: You don't think I have the right
3 to ask a former employee of the defendant leading
4 questions, who's represented by you today?

5 MR. GILLIS: I think you do if you were
6 cross-examining her, but you are one who noticed the
7 deposition and you're taking a direct examination, not a
8 cross, and I'd rather just have it on as an ongoing
9 objection than to have it on the record every time you
10 have a question that it's in them middle of the answer.

11 MR. FARRAH: I'm happy to let -- allow you to
12 have the ongoing objection, but I believe most
13 respectfully you're wrong.

14 Q. How many meals are shown on the check?

15 A. Meals?

16 Q. Meals, ma'am?

17 A. There are -- this is cutoff. Usually there
18 will be a number next to how many of each was ordered.
19 There is -- okay, there's three baby back ribs there, I
20 see that now. So there was three, four, five, six meals,
21 and from what I recall, the chicken tenders were ordered
22 as a -- chicken fingers were ordered as a meal.

23 Q. Who ordered the chicken fingers?

24 A. I don't recall.

25 Q. Do you have any memory that anyone of Mr.

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1 Q. You have no memory who ordered that; is that
2 right?

3 A. Not specifically ordered it, no.

4 Q. Someone at that table?

5 A. Yes, sir.

6 Q. Is it also correct that there were two orders
7 of chowder cup?

8 A. Yes.

9 Q. And an order of fingers?

10 A. Yes, sir.

11 Q. What's that?

12 A. Chicken fingers.

13 Q. Chicken fingers, okay. So how many
14 appetizers were ordered at 8:40 p.m.?

15 A. Specifically appetizers there are the
16 Tonions, the chicken fingers and the two cups of chowder.

17 Q. Is that four appetizers?

18 A. Yes.

19 Q. Did any of the people who came from the bar
20 bring appetizers with them along with their drinks that
21 you remember?

22 A. No, not that I remember.

23 Q. So is it accurate to say that none of the
24 people who came from the bar ordered appetizers from you?

25 A. They were all sitting at the table, and they

1 Southworth's party when first seated brought any drinks
2 from the bar to the table with them?

3 A. Yes. The ones who were waiting at the bar
4 for the others to join them brought drinks with them.

5 Q. How do you know that?

6 A. I recall from that night they had come down.
7 I didn't serve a full round with the ones who had sat
8 down.

9 Q. What drinks did they bring with them from the
10 bar?

11 A. I don't recall, but from what they drank from
12 then on the night, I would say they were Manhattans.

13 Q. And the basis for that is just what they
14 drank from there on out?

15 A. They continued -- you -- from my experience
16 as a waitress, when someone comes with a drink, that is
17 what they continue to drink.

18 Q. The first order -- go to page two of Exhibit
19 #8 if you would please. And that indicates that the
20 first order was placed at 8:40 p.m.; is that right?

21 A. Yes, sir.

22 Q. What is a Tonion for \$5.99?

23 A. It's a Tonion, it's an appetizer. It's like
24 a Bloomin' onion. It's onion peels battered, dipped and
25 fried.

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1 ordered these appetizers as a whole party.

2 Q. Did they share the chowder cups?

3 A. The chowder cups, no, two individuals
4 probably had those.

5 Q. Are you guessing?

6 A. I am not guessing, no. I would say two
7 individuals, one each, had a chowder cup.

8 Q. So the appetizers then were shared by -- the
9 remaining appetizers were shared by the rest of the
10 party; is that right?

11 A. Yes.

12 Q. Were the remaining appetizers shared by the
13 rest of the party, if you know?

14 MR. GILLIS: Objection.

15 A. Do I recall specifically seeing --

16 Q. Yes.

17 A. -- every single one of them eat it, no.

18 Q. At that time four Jack Daniels -- excuse me,
19 three Jack Daniels Manhattans and a Bud Light, 25 ounce
20 Bud Light were ordered; is that right?

21 A. Yes, sir.

22 Q. How much pure alcohol is there in a 25 ounce
23 Bud Light?

24 A. I don't know.

25 Q. How much pure alcohol is there in the Jack

1 Daniels Manhattan?

2 A. I don't know.

3 Q. How much -- how many ounces of Jack Daniels
4 are in the Jack Daniels Manhattan?

5 A. From what I recall working there, I would say
6 a little over an ounce.

7 Q. What is the basis for that statement?

8 A. Usually from when they make the drinks it's
9 always a jigger, and the way they set it up on the bar
10 and pour them in, the jiggers were all consistent.

11 Q. Do you recall watching Christen make the
12 drinks that night?

13 A. No.

14 Q. Do you recall watching Christen use a jigger
15 that night?

16 A. No.

17 Q. Did she use a jigger that night?

18 A. I don't know.

19 Q. Prior to that night had you ever ordered Jack
20 Daniels Manhattans before?

21 A. Yes.

22 Q. Is it your memory that -- And how were they
23 made? Were they made with jiggers?

24 A. The ones I've seen made, yes.

25 Q. So do you have a memory of whether or not

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1 the appetizers.

2 Q. Is it shown on Exhibit #8?

3 A. The bill?

4 Q. It is shown on any portion of Exhibit #8,
5 that Sprite?

6 A. No.

7 Q. It's not?

8 A. No.

9 Q. And you've looked for it; is that right?

10 A. Have I looked --

11 Q. The Sprite?

12 MR. GILLIS: Why don't you look through the
13 whole document first. Not just the first page, but the
14 whole thing.

15 A. There is Sprites on here but not for his
16 table.

17 Q. After ordering -- by the way, the computer
18 allows you, if you erroneously indicated the number of
19 people sitting at the table, the computer allowed you to
20 overwrite -- did the computer allow you to overwrite the
21 number of people at the table?

22 A. From what I recall, yes.

23 Q. Now, what did you do according to Exhibit #8,
24 between 8:40 when you placed that order that we just
25 talked about, and 8:51 when you placed another order for

1 drinks were free poured at the Longhorn prior to
2 September 26, 2003, in the service bar?

3 A. All of the time?

4 Q. Well, do you have a memory of whether drinks
5 were ever free poured on the service bar?

6 A. Occasionally, yes.

7 Q. Do you have a memory of whether or not
8 jiggers were used in the service bar at the Longhorn
9 prior to September 26, 2003?

10 A. Yes, they were.

11 Q. Which was used more, if you can tell me, free
12 pour or jiggers?

13 A. I couldn't give an accurate --

14 Q. Do you have any memory at all?

15 MR. GILLIS: Objection.

16 A. No.

17 Q. Was anybody under age at the table? By under
18 age, I mean under 21?

19 A. Not that I recall.

20 Q. Did you serve soft drinks to anyone at the
21 table?

22 A. From what I recall, I did put one Sprite down
23 on the table.

24 Q. When did you do that?

25 A. From what I recall, it would have been with

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1 that table?

2 A. What did I do between the time?

3 Q. What does Exhibit #8 indicate you did?

4 A. It indicates I rang in those drinks. I

5 cashed out table 63. Printed a check for table 63.

6 Entered some more drinks for a new table that was sitting

7 at 63. Ordered a meal for 63. Logged in and out of the

8 computer. Applied a payment to table 53 and printed a

9 check for table 53. And closed table 53. And logged

10 out, logged back in, ordered drinks for table 52.

11 Q. All of that between 8:40 and 8:51; is that
12 right?

13 MR. GILLIS: Objection.

14 A. Yes.

15 Q. Do you know which computer terminal you
16 performed those various entries upon?

17 A. No.

18 Q. There were terminals at different -- were
19 there terminals at different places in the restaurant
20 that night available to you to do this?

21 A. Yes.

22 Q. From time to time in the past did you have to
23 wait, once you had ordered drinks through the terminal,
24 for those drinks to be prepared by the service bartender?

25 A. Yes.

1 Q. What is the most you can recall -- most
2 amount of time you can recall waiting for drinks to be
3 prepared?
4 A. I recall waiting up to about 15 minutes for a
5 drink to be made.
6 Q. Do you have a memory this Friday night,
7 whether or not once you placed the order at 8:40 p.m. for
8 the three Jack Daniels Manhattans and the 25 ounce beer,
9 you waited for those drinks to be made?
10 A. No.
11 Q. Do you have any memory one way or the other
12 whether you waited for those drinks to be made?
13 A. No.
14 Q. Is it your belief that you waited for the
15 drinks to be made?
16 A. I don't remember.
17 Q. Given that it was a Friday night?
18 A. Given that it was a Friday night, yes,
19 probably waited.
20 Q. Do you know at what time you served the
21 drinks that you ordered at 8:40, the three Jack Daniels
22 Manhattans and the 25 ounce beer, to whomever had ordered
23 those drinks?
24 A. Do I remember what time I served them to
25 them?

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1 previously and come back?
2 MR. FARRAH: No, I'm asking did she put the
3 four drinks down and take another order.
4 MR. GILLIS: Do you understand the question?
5 A. I understand the question. From what I
6 recall, no.
7 Q. Do you know what happened -- is it your -- do
8 you have a memory of whether or not -- do you have a
9 memory of whether or not the four drinks that were logged
10 into the computer by you at 8:40 had been finished by the
11 people to whom you served those four drinks by the time
12 you took the order from the table that you logged into
13 the computer at 8:51?
14 MR. GILLIS: Second round, first round. I
15 don't understand --
16 MR. FARRAH: Let her answer the question,
17 please.
18 MR. GILLIS: Well, I want to see if I can
19 understand so I can object to it. You're asking was the
20 first round completely drank before she ordered it, or
21 was it drink when she brought them. What's your
22 question?
23 MR. FARRAH: Could we go off the record for a
24 second.
25 (Off the record.)

1 Q. Yes, ma'am.
2 A. Specifically no.
3 Q. Do you know whether or not you served those
4 drinks to them at the same trip to the table at which the
5 8:51 p.m. drinks, seven Jack Daniels Manhattans were
6 ordered?
7 A. Did I make them both in the same trip?
8 Q. Do you know whether or not you served the
9 four drinks ordered at 8:40 p.m. at the same trip to the
10 table at which you -- an order for seven Jack Daniels
11 Manhattans that you placed at 8:51 p.m. was given to you?
12 MR. GILLIS: Objection.
13 A. No.
14 Q. Do you know one way or the other whether you
15 did that?
16 MR. GILLIS: Did what?
17 MR. FARRAH: Whether she served the drinks
18 that were ordered at 8:40 at the same time she took the
19 order for -- the same trip to the table, that she took
20 the order for the drinks ordered at 8:51?
21 MR. GILLIS: Can you just clarify, are you
22 asking did she put those four drinks down and then take
23 another order or did --
24 MR. FARRAH: Yeah.
25 MR. GILLIS: -- she put those drinks down

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1 (Back on the record as follows:
2 BY MR. FARRAH:
3 COURT REPORTER: The question was: Do you
4 have a memory of whether or not the four drinks that were
5 logged into the computer by you at 8:40 had been finished
6 by the people to whom you served those four drinks by the
7 time you took the order from the table that you logged
8 into the computer at 8:51?
9 MR. GILLIS: Objection.
10 A. I do not recall if they were done with them
11 by the time I took that order, no.
12 Q. Do you have a memory whether they were done
13 with them by the time you took that order?
14 A. I don't remember either way.
15 Q. Do you have a memory of whether they had
16 received the drinks that they ordered, that you logged in
17 at 8:40 by the time you took the order for the 8:51
18 drinks?
19 A. They would have received them by 8:51.
20 Q. What is the basis for that statement?
21 A. There is -- in my experience, and what I have
22 done through Longhorn, there is no way between putting
23 drinks in, waiting on all of these other tables, that I
24 would have not at least gotten that table their drink
25 even before taking a second drink order. That would

1 happen. I wouldn't have not given them their first
2 drinks, but already taken an order for a second. That
3 wouldn't have happened.

4 Q. Do you have a memory of whether or not as
5 part of the trip to the table at which you delivered the
6 drinks that you logged in at 8:40, you took the order for
7 the seven Jack Daniels Manhattans that you logged in at
8 8:51?

9 MR. GILLIS: Objection.

10 A. I don't understand that?

11 Q. My question is, do you have a memory of
12 whether or not when you were bringing the drinks that had
13 been logged in at 8:40, you put those drinks down on the
14 table, and then you took an order for seven Jack Daniels
15 Manhattans that you logged in at 8:51?

16 A. I don't recall that specifically, no.

17 Q. But you don't recall that it didn't happen,
18 either, do you?

19 MR. GILLIS: Objection.

20 A. Correct.

21 Q. Now, do you recall any conversations with
22 Christen O'Donnell that night about that she had -- about
23 whether or not she had run out of glasses to make the
24 Jack Daniels Manhattans that you were ordering?

25 A. No.

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1 computer, the 9:00 food order, whether or not you had
2 delivered the seven Jack Daniels Manhattans that had been
3 ordered at 8:51 to the customers?

4 A. I do not recall.

5 Q. Do you recall during that part of the evening
6 from 8:40 to 9:24, any conversations with Christen about
7 the table that Mr. Southworth was at?

8 A. Yes.

9 Q. Do you recall when in the sort of the order
10 of ordering that we have been talking about, you had the
11 first conversation with Christen?

12 A. I only had one conversation with Christen and
13 that was on the last round that I had ordered for the
14 table.

15 Q. That round was placed at what time?

16 A. Says 9:21.

17 Q. Can you turn to the next page?

18 A. 9:24.

19 Q. So you placed an order at 9:24 -- you entered
20 into the computer at 9:24; is that right?

21 A. Yes.

22 Q. Then you had a conversation with Christen
23 after you entered into the computer; is that right?

24 A. When I went to pick them up from the bar,
25 that is when I had the conversation with Christen.

1 Q. Do you recall that night that any of the Jack
2 Daniels Manhattans that were delivered to the table were
3 delivered in the blue glasses --

4 A. None of them were --

5 Q. -- shown on Exhibit #10?

6 A. I'm sorry. None of them were, no.

7 Q. Now, can you tell us according to Exhibit #8
8 the -- I want to say the -- we're now on to the third
9 page of Exhibit #8, what activity you undertook according
10 to Exhibit #8 from 8:51 when the seven Jack Daniels
11 Manhattans were ordered, until food was ordered by table
12 52?

13 A. I ordered appetizers and a drink for table
14 53. Logged out, logged in to table 52, and then ordered
15 their meals.

16 Q. Now, let me ask you this. Do you know when
17 the drinks ordered at 8:51 p.m. the seven Jack Daniels
18 Manhattans were delivered by you to the table?

19 A. No.

20 Q. Was there a practice that you employed as of
21 that time, September 26, 2003, of delivering drinks and
22 then taking a meal order at the same trip to the table?

23 A. Not a specific practice, no.

24 Q. Do you know by the time you had delivered --
25 excuse me. By the time you had entered into the

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1 Q. Was the time that you went to pick them up
2 from the bar after 9:24?

3 A. Yes.

4 Q. Sometime after 9:24 depending upon how busy
5 the restaurant was?

6 A. Yes.

7 Q. Can you tell us how long after 9:24 it was
8 that you had that conversation with Christen?

9 A. No.

10 Q. What do you remember she said and what did
11 you say during that conversation?

12 A. She specifically asked if it was for my
13 table. She asked me how many each of them had had and if
14 I thought they were okay. I said yes, and that was it.

15 Q. She asked you three questions, didn't she?

16 A. Not from what I recall, no.

17 Q. You just told us that she asked you were they
18 specifically for your table?

19 A. Yes.

20 Q. And you answered yes to that; is that right?

21 A. Yes.

22 Q. Then she asked you, according to what you
23 just told us, how much each customer had had, do you
24 recall that?

25 A. Yes.

1 Q. What did you say in answer to that question?
2 A. I told her at the time each of them had had
3 two at that time; had had -- there was one order here. I
4 had served -- this was going on their second round.
5 Q. What did you tell Christen, as best as you
6 can recall?
7 A. That this was going to be their second round.
8 Q. Their second round of Jack Daniels
9 Manhattans?
10 A. From myself, yes.
11 Q. What was the basis for saying that?
12 A. That is how many I had served them.
13 Q. Okay. This was the 9:24 order; is that right?
14 A. Yes. That was going to be their second
15 drink.
16 Q. Then the third question she asked you was,
17 are they okay?
18 A. Yes.
19 Q. Is that what she said; are they okay?
20 A. She said, how do you think they are, do you
21 think they are okay? And I said yes.
22 Q. What was the basis for that statement?
23 A. My observation of their behavior.
24 Q. Was that this was the second round of drinks
25 that you had ordered for them also part of the basis for

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1 be intoxicated?
2 A. No.
3 Q. What did Christen say when you answered
4 whatever you answered to her?
5 A. She -- from what I recall, she didn't say
6 anything.
7 Q. Who ordered the first beer from you, that is
8 the 8:40 beer?
9 A. I would say the gentleman with the black hat
10 and the curly hair.
11 Q. Describe his hat for me?
12 A. From what I recall, it was just an all black
13 baseball cap.
14 Q. How were these people dressed?
15 A. From what I recall, the three who sat down
16 were dressed how they normally do when they come in after
17 dirt biking, just kind of dirty boots and Mr. Southworth
18 usually just wore like sweat pants and a baggy T-shirt
19 and boots. And like a --
20 Q. You can remember that --
21 A. -- a flannel kind of jacket the used to wear.
22 Q. Is that how the was dressed that night?
23 A. The had his boots and sweat pants on from
24 what I recall.
25 Q. You said the three who sat down; what do you

1 the statement that they were okay?
2 A. I don't understand that.
3 Q. Tell me all of the factors you considered in
4 answering yes, to the question Christen asked you, are
5 they okay?
6 A. It was my belief that if I served them one
7 more drink they would still be fine.
8 Q. Tell me all of the factors you considered,
9 though, in telling her that that was your belief?
10 MR. GILLIS: Objection.
11 A. I consider at the time --
12 Q. Wait a minute. Strike that. I withdraw the
13 question. Tell me all of the factors you considered in
14 telling her they were okay?
15 MR. GILLIS: Objection.
16 A. I considered their behavior at the table, the
17 food that they had consumed, my observation of how each
18 of them acted, how they acted as a group, how they would
19 react with one more drink in their system. My experience
20 being in the business and serving other people of their
21 height, stature, weight, personalities, drinks and how
22 they've reacted.
23 Q. Is it accurate -- have you ever seen in the
24 time -- the entire time you worked at the Longhorn, have
25 you ever seen a Longhorn customer that you considered to

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1 mean by that?
2 A. The three who were waiting at the bar for the
3 other ones before they joined.
4 Q. They sat down first?
5 A. They came over and the other four followed,
6 yes. The three that sat down already had drinks, yes.
7 Q. And Mr. Southworth was one of them those; is
8 that right?
9 A. Yes.
10 Q. What did he bring over for a drink?
11 A. I don't specifically recall.
12 Q. How were the others dressed?
13 A. T-shirts, baseball caps.
14 Q. Now, during the night was this table loud, at
15 all?
16 A. Not that I recall, no.
17 Q. Did the manager speak to them that night?
18 A. I am sure he did.
19 Q. My question to you though is, do you know
20 whether the manager spoke to them that night?
21 A. No.
22 Q. You are just speculating that the manager
23 spoke to them?
24 MR. GILLIS: Objection.
25 A. Yes, the manager speaks to every table.

1 Q. That is the manager's policy?

2 A. Yes, they are to walk through the dining room
3 and touch on every table.

4 Q. Do you have a recollection that the manager
5 came -- that any manager went to that table that night,
6 the Southworth table, and asked the table to quiet down?

7 A. No.

8 Q. Has anyone ever told you that the manager
9 came to the table and ask the table to quiet down?

10 A. No.

11 Q. Do you know whether or not Leigh [sic] asked
12 the manager on duty that night to go take a look at the
13 table to make sure they were okay?

14 MR. GILLIS: Objection.

15 A. No.

16 Q. Did you here Leigh ask the manager to do
17 that?

18 MR. GILLIS: Objection.

19 A. Lee, the manager, to do that?

20 Q. I'm sorry, you're Leigh. Pardon me. Do you
21 know --

22 A. There is a manager Lee, so

23 Q. Is there?

24 A. Yes.

25 Q. Lee who?

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1 full round and then the four who didn't have drinks got a
2 round when they sat down.

3 Q. And you have a memory of that?

4 A. Yes.

5 Q. Then after you took the food orders at 9:00
6 can you tell us from Exhibit #8 what you did between then
7 and 9:21 when you placed an order for four Jack Daniels
8 Manhattans?

9 MR. GILLIS: Objection.

10 A. I logged in and out of the computer, ordered
11 for table 53, ordered a Bud Light for table 52, logged
12 out, logged in, logged out, logged in. Printed table
13 52's check, logged out, logged in and then ordered the
14 Jack Daniels.

15 Q. Now, were you keeping a record of how many
16 drinks each person at that table that night had had to
17 drink, other than what's -- well, were you keeping any
18 record of how many drinks they had to drink?

19 MR. GILLIS: Objection.

20 MR. FARRAH: Any kind of record.

21 A. Mental record.

22 Q. Mental record?

23 A. Yes.

24 Q. Where were you keeping that?

25 A. Mentally.

1 A. Lee Bull. She was a manager there while I
2 was there.

3 Q. In September of --

4 A. I'm not sure when she worked there. There
5 was a manager Lee Bull.

6 Q. Pardon me. Do you know whether Christen
7 asked the manager, whatever manager was on duty that
8 night to go over and make sure the table was okay?

9 MR. GILLIS: Objection.

10 A. No, I don't.

11 Q. Do you know whether Christen ask the manager
12 to do anything -- manager on duty to do anything with
13 regard to that table that night?

14 MR. GILLIS: Objection.

15 A. No, I don't.

16 Q. Did Christen tell you what her concerns were
17 when she asked you those questions?

18 A. No.

19 Q. And at the time she asked you those
20 questions, how many rounds had you served to the table?

21 A. Before the last round I had only served the
22 table one round.

23 Q. That was the seven drinks that you ordered at
24 8:51; is that right?

25 A. I had served one and a half rounds. It was a

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1 Q. Were you doing the same thing for all of the
2 other tables you were serving that night?

3 A. I would only do it for tables I was serving
4 alcohol to, and that would be it.

5 Q. Were you doing it for all of the other tables
6 you were serving alcohol to that night?

7 A. Yes.

8 Q. Mental record. Was there any requirement in
9 place as of September 26, 2003 at the Longhorn that you
10 keep a written record of how many drinks were being
11 served to your customers?

12 A. No.

13 MR. GILLIS: Objection.

14 Q. Do you know why you printed the check at 9:17
15 p.m.?

16 A. No.

17 Q. Do you know to whom you served the beer that
18 was logged in at 9:15 p.m.?

19 A. I don't recall, no.

20 Q. Is it your best memory as you sit here now
21 that one or more of your customers were drinking both
22 beers and Jack Daniels Manhattans that night?

23 MR. GILLIS: Objection.

24 A. I don't recall.

25 Q. And then at 9:21 p.m. -- By the way, did you

1 clear the glasses off the table?

2 A. Yes.

3 Q. Typically, where would you take -- where did
4 you take the glasses that you cleared off the table while
5 you were working on a Friday night at the Longhorn?

6 A. Right to the dish pit and put them in a glass
7 rack.

8 Q. For cleaning?

9 A. Yes. Certain glasses went to the dish pit.
10 Certain glasses went back to the bar.

11 Q. To the service bartender?

12 A. Yes.

13 Q. Which glasses went back to the service
14 bartender?

15 A. The straight up Manhattan glasses and the
16 Texas margarita shaker glasses. Beer mugs, the large beer
17 mugs went back to the bar also.

18 Q. The Texas margarita shaker glasses
19 are the ones shown, the blue ones shown in Exhibit #10;
20 is that right?

21 A. Yes.

22 Q. And the straight up Manhattan glasses are the
23 ones shown on the lower shelf of Exhibit #9; is that
24 right?

25 A. Yes.

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1 Q. And is it your best -- do you have a memory
2 of whether or not Christen gave you the seven Jack
3 Daniels Manhattans that had been ordered in two segments,
4 one segment at 9:21 and other at 9:24 at the same time?

5 A. Did she give them all to me at the same time?

6 Q. Yes, ma'am.

7 A. I would have picked them up all at the same
8 time.

9 Q. And that's when you had the conversation with
10 her, are these people okay?

11 A. Yes.

12 Q. Then did you print the check at 9:34 p.m?

13 A. Yes.

14 Q. Why did you do that? If you know.

15 A. Why did I print it?

16 Q. Yes, ma'am.

17 A. They were done with everything.

18 Q. Is that what you remember?

19 A. I --

20 Q. Do you know why you printed it?

21 A. No.

22 Q. Then you printed it a third time at 9:34; is
23 that right?

24 A. Yes.

25 Q. Do you know why you did that?

1 Q. Then at 9:21 you ordered four Jack Daniels
2 Manhattans; is that right?

3 A. Yes.

4 Q. Then you came back and at 9:24 you ordered
5 four more; is that right -- excuse me, three more? .

6 A. Yes.

7 Q. Can you explain to me what happened there?

8 A. I would think that what happened there --

9 Q. Do you remember what happened?

10 A. Specifically remember?

11 Q. Yes, ma'am.

12 A. Specifically, no.

13 Q. What do you think happened there?

14 A. That because of the difference and some
15 people already having drinks from the bar, and the others
16 not, that these four had finished their second drinks
17 sooner than the other three, so they ordered there's and
18 then within a few minutes the other ones ordered theres.

19 Q. That's your -- what you're sort of
20 speculating happened now; is that right?

21 MR. GILLIS: Objection.

22 A. Yes.

23 Q. Is that anything from but speculation?

24 MR. GILLIS: Objection.

25 A. No.

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1 A. No.

2 Q. Then at 9:36 -- excuse me. Then at 9:36 you
3 printed it a fourth time?

4 A. Yes.

5 Q. Do you know why you did that?

6 A. No.

7 Q. Do you know what you did with the checks you
8 printed?

9 A. No.

10 Q. Then at 9:36 you did some things here, do you
11 see that?

12 A. Yes.

13 Q. Tell me what the Exhibit #8 indicates you did
14 at 9:36?

15 A. At 9:36 I applied payment to 62. The total
16 payment to 62, which you have to log in by denominations.
17 I closed out. I printed the check for table 62. Closed
18 out a check for 62.

19 Q. And that happened all at 9:36; is that right?

20 A. Yes.

21 Q. And how much cash did table 62 deliver to you
22 at 9:36?

23 A. From what I entered 71.

24 Q. And the bill was how much for that table?

25 A. \$51.56.

1 Q. \$61.66.
 2 A. Okay.
 3 Q. I don't want to put words in your mouth. Do
 4 you want my glasses to try --
 5 A. No, thank you.
 6 Q. Does it look like -- looks -- can you tell?
 7 A. Can -- yes, it looks like it says \$61.56.
 8 Q. And the difference between the \$70 on the
 9 table and the \$61.56 is your tip; is that right?
 10 A. Yes.
 11 Q. Who was sitting at table 62?
 12 A. 62, I don't recall. I recall the two tables
 13 being pushed together. It could have been a table before
 14 they sat.
 15 Q. 62 was part of this group, wasn't it?
 16 MR. GILLIS: Objection.
 17 Q. Did you tell us this morning that tables 52
 18 and 62 were joined together for the Southworth party?
 19 A. From what I recalled, yes.
 20 Q. And if tables 52 and -- well, strike that.
 21 What activity is there on Exhibit #8 for table 62 that
 22 you can see up to the time that you cashed that table
 23 out?
 24 A. I don't see any.
 25 Q. Do you know what was served to table 62 prior

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1 twenty dollar bills as best as you know?
 2 A. Yes.
 3 Q. And the total check was how much, ma'am?
 4 A. \$202.79.
 5 Q. So the tip from table 52 was the difference
 6 between \$240 and \$202.79; is that right?
 7 A. Yes.
 8 MR. GILLIS: Objection.
 9 Q. What was the amount of the tip that you
 10 received from table 52 that night?
 11 A. Simply math would show it's about \$37.
 12 Q. 21 cents?
 13 A. \$37.21 yes.
 14 Q. And the tip from table 62 was how much,
 15 ma'am?
 16 A. Roughly about, from what I just recall
 17 reading, \$9.
 18 Q. And can you tell me why you at 9:56 printed
 19 the check a fifth time?
 20 A. No.
 21 Q. Can you tell me why at 9:36 you printed the
 22 check a fourth time, this is the check for table 52?
 23 A. Correct. No.
 24 Q. That night as you were serving Mr.
 25 Southworth, did you have an expectation that he would

1 to 9:36 p.m. when the table was cashed out?
 2 A. No.
 3 Q. Do you have any memory at all?
 4 A. No.
 5 Q. And your best memory is that table 62 was the
 6 table that was joined with 52 for Mr. Southworth's party;
 7 is that right?
 8 MR. GILLIS: Objection.
 9 A. Yes.
 10 Q. Do you know when you opened the check for
 11 table 62 that was cashed, the one that was cashed out at
 12 9:36?
 13 A. No.
 14 Q. Now in any event at what time did the
 15 Southworth table -- what time does Exhibit #8 indicated
 16 that table 52 cashed out?
 17 A. It cashed out at 9:57.
 18 Q. And can you tell me the denominations of
 19 bills that were placed on the table for you?
 20 A. No.
 21 Q. Can you tell from looking at Exhibit #8 what
 22 the denomination of the bills placed on the table for you
 23 were?
 24 A. One hundred, one hundred, twenty, twenty.
 25 Q. Is that two one hundred dollar bills and two

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1 become intoxicated?
 2 A. No.
 3 Q. Were you concerned that night that he would
 4 become intoxicated?
 5 A. No.
 6 Q. Did you calculate that night the amount of
 7 alcoholic beverages he drank?
 8 MR. GILLIS: Objection.
 9 A. No.
 10 Q. Did you -- in determining that you had no
 11 expectation that he would become intoxicated that night,
 12 did you take into effect the volume of alcoholic
 13 beverages that he had been served?
 14 MR. GILLIS: Objection.
 15 A. What I served him?
 16 Q. Yes, ma'am.
 17 A. Yes.
 18 Q. And you knew you served him what?
 19 A. I served him two rounds of Manhattans.
 20 Q. Now, is that your testimony today?
 21 A. Yes.
 22 Q. You served him two Jack Daniels Manhattans?
 23 A. Yes.
 24 Q. But you told -- you made a statement that he
 25 had three Manhattans on November 2, 2003; isn't that

1 right?

2 A. Yes.

3 Q. And that's because the best you remember it
4 back on November 2, 2003, you served him three Manhattans
5 isn't that right?

6 MR. GILLIS: Objection.

7 A. It doesn't say that I served him three
8 Manhattans, but it says he had three Manhattans. So from
9 what I know, he may have had one before myself. So I
10 served him two.

11 Q. So if you served Mr. -- If your testimony is
12 you served Mr. Southworth two Manhattans, what I'd like
13 to know is how many Manhattans did you serve the other
14 folks who were at the table?

15 MR. GILLIS: Which ones?

16 Q. Any.

17 A. I would have served the ones who came from
18 the bar with Mr. Southworth two, and the ones who did not
19 joint him from the bar, three.

20 Q. So you would have served four persons three
21 Manhattans each; is that right?

22 MR. GILLIS: Objection.

23 A. Yes.

24 Q. That's 12 Manhattans? Then you would have
25 served Mr. Southworth two Manhattans; is that right?

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1 night?

2 A. Not from what I recall.

3 Q. So that leaves for how many people 15 Jack
4 Daniels Manhattans and two beers to divide up?

5 A. Six.

6 Q. And do you know who drank what of those 17
7 drinks?

8 A. I don't recall, no, except for the boy in the
9 black hat that I know had a beer.

10 Q. Do you know what you served table 62 prior to
11 9:36 that night when it paid you -- paid a check
12 totalling \$61.56?

13 A. No.

14 Q. Were you trained to calculate the effect of
15 -- strike that.

16 Were you trained to estimate the effect of
17 alcoholic beverages on your customers?

18 A. We were given tools on how to make a decision
19 on how it would affect them.

20 Q. Let me ask you this, did you consider the
21 Jack Daniels Manhattans that you were serving to any of
22 the customers to be single drinks or double drinks?

23 A. I considered them to be single drinks.

24 Q. And what was the basis for that?

25 A. Because they weren't doubled. To

1 A. Yes.

2 Q. That is 14 Manhattans. How many Manhattans
3 did you serve that night?

4 A. Seventeen.

5 Q. Who got the other three?

6 A. Obviously members at the table.

7 MR. GILLIS: Objection.

8 Q. Which other members --

9 MR. GILLIS: Can we go off the record for a
10 second?

11 (Off the record.)

12 (Back on the record as follows:)

13 BY MR. FARRAH:

14 Q. You served a total of 17 Jack Daniels
15 Manhattans that night, ma'am; is that right?

16 A. Yes.

17 Q. And you served two 24 ounce beers that night;
18 is that right?

19 A. Yes.

20 Q. Two of those Jack Daniels Manhattans you say
21 you served to Mr. Southworth; is that right?

22 A. Yes.

23 Q. At least 15 Jack Daniels Manhattans?

24 A. Yes.

25 Q. Did you serve Mr. Southworth a beer that

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1 specifically get a double drink you have to specifically
2 order and Longhorn didn't do doubles anyway.

3 Q. Do you know what the Longhorn recipe for
4 Manhattans called for in terms of how much Jack Daniels
5 to be put in?

6 A. From what I recall, a little over an ounce.

7 Q. What's the basis for that statement?

8 A. The rocks glasses were only so big so to fit
9 Jack Daniels and they fit in the jigger, the jiggers were
10 only about an ounce and a half.

11 Q. What's the basis for that statement?

12 A. We were taught that.

13 Q. Were you concerned that any time you were
14 serving Mr. Southworth that night that you were serving
15 someone who was intoxicated?

16 A. Did I ever consider that?

17 Q. Yes, ma'am.

18 A. No.

19 Q. Were you concerned that you were serving
20 someone who could become intoxicated as a result of what
21 you served him?

22 A. No.

23 Q. Did you know at that time whether or not the
24 effects of alcohol increased over a period of time?

25 A. Did I know for a fact?

1 Q. Yes, ma'am.
2 A. For a fact, no.
3 Q. Had you been trained in whether or not the
4 effects of alcohol increased over time?
5 A. Yes.
6 Q. What had you been trained?
7 A. That over time if -- depending on whether
8 eating food that your metabolism with food in it added to
9 alcohol slows down the process of alcohol.
10 Q. Do you know how many drinks of alcohol the
11 body can process at any -- per hour?
12 A. No.
13 Q. Had you been trained in that?
14 A. I'm sure we were.
15 Q. You just don't remember now?
16 A. Correct.
17 Q. Did you know back in November?
18 A. I don't know.
19 Q. Can we just spend a minute or two looking at
20 some documents. Let me first show you this. Showing you
21 what's been marked as Exhibit #2 to your deposition. I
22 represent to you it's the Longhorn Bar Recipe document
23 that was giving to me, produced to me by Longhorn,
24 Longhorn's lawyers, and I want to point out to you that
25 -- I want you to read, actually, the ingredients that go

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1 A. I didn't base it on the amount of what I knew
2 to be a fact of alcohol in there. I knew what he was
3 receiving, the exact amount did not factor -- whether
4 it's a half an ounce or not, it still wouldn't have
5 changed my opinion on whether he was drunk or not.
6 Q. He was receiving double drinks; isn't that
7 right?
8 A. No.
9 Q. Weren't you trained that the Manhattan is a
10 double drink?
11 MR. GILLIS: Objection.
12 Q. Weren't you trained that, is my question?
13 Were you trained that the Manhattan is a double drink?
14 MR. GILLIS: Objection.
15 A. No. We were trained it was a more alcoholic
16 drink.
17 Q. Oh, yeah. Where were you trained that?
18 A. It didn't have a mixer in it, is what we were
19 trained.
20 Q. It's got vermouth in it, doesn't it?
21 A. It's not a mixer such as orange juice or
22 something like that, that's what we considered mixer.
23 Q. I'm now referring you to Exhibit #1, which is
24 the Server Guide. It's going to take me a minute. Can
25 you turn to page 13. Do you remember reading the Server

1 into a Manhattan as you say on the rocks.
2 A. Two ounces house bourbon and a quarter ounce
3 dry vermouth.
4 Q. Do you have any reason to believe that Ms.
5 O'Donnell did not follow -- do you want to show him -- Do
6 you have any reason to believe that Ms. O'Donnell did not
7 follow Longhorn policies in making that Manhattan?
8 MR. GILLIS: Objection.
9 A. No.
10 Q. So if the Manhattan that she -- the
11 Manhattans that she made you contained not a little over
12 an ounce of alcohol, but two ounces of bourbon, would
13 that change your opinion about whether or not Mr.
14 Southworth was intoxicated at the time the was served his
15 last drink?
16 A. No.
17 Q. Why is that?
18 A. Based on my observations and my judgment call
19 on him, I don't believe he was intoxicated.
20 Q. But you understood, did you not, that he was
21 receiving Manhattans, however many Manhattans he received
22 from you, he was receiving Manhattans that contained a
23 little over one ounce of Bourbon in them?
24 MR. GILLIS: Objection.
25 Q. Is that what you understood?

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1 Guide.
2 A. I remember reading it.
3 Q. You didn't refer to it -- did you refer to it
4 after you had become certified?
5 A. No.
6 Q. Sort of brush up a little bit? Keep aware of
7 what you had learned back in the year 2000?
8 A. No, not that I recall.
9 Q. By the way, did you -- were you trained and
10 certified, that is bar code trained and certified all in
11 the same day?
12 A. No.
13 Q. How many days after the training was it that
14 you took the test and pasted it?
15 A. I am not positive.
16 Q. On page 6 can you look at page 6 of this
17 exhibit, Exhibit #2. Do you see at the top, where it
18 says, use these comparisons to estimate how much alcohol
19 a guest has consumed? Do you see that?
20 A. Yes.
21 Q. Then it goes on to say, always be alert for
22 several other factors that can affect the strength of a
23 drink; do you see that?
24 A. Yes.
25 Q. And you see down three bullet points down is,

1 drinks made with double the amount of liquor such as
2 martinis and Manhattans; is that right?
3 A. Yes.
4 Q. Were you alert for that fact that night when
5 you were deciding whether or not Mr. Southworth was
6 intoxicated?
7 A. Was I alert for it, no.
8 Q. You didn't consider that, did you?
9 A. No.
10 Q. And how many Manhattans did you see Mr.
11 Southworth -- did you personally see -- How many
12 Manhattans did you see Mr. Southworth -- did you
13 personally see, how many of these Jack Daniels Manhattans
14 did you personally see Mr. Southworth consume as of the
15 time he left the restaurant? You personally?
16 A. He personally -- the ones that I served him,
17 did I watch him drink the whole entire thing, no. I
18 couldn't be at the table the whole time.
19 Q. My question is, did he bring a Manhattan,
20 it's your testimony that he brought a Manhattan with him
21 from the bar?
22 A. He brang a drink with him from the bar.
23 MR. GILLIS: Objection.
24 Q. You don't know what he brought; is that
25 right?

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1 certain characteristics about that night but after being
2 able to review the bill and the other report, after
3 reviewing step by step and going through everything, I
4 believe my memory -- certain things have stood out.
5 Q. What other report?
6 A. This report. The audit report.
7 Q. So you think your memory is better today of
8 the events that happened two and a half years ago then it
9 was a month after the accident; is this right?
10 MR. GILLIS: Objection. On what issues?
11 Q. On how much the was served?
12 A. Yes.
13 Q. And between November of 2003 and when you
14 first talked to Neil, or counsel for RARE, you did
15 nothing at all to refresh your memory about the events of
16 this night; is that right?
17 A. To refresh it, no.
18 Q. To do anything to --
19 A. Had I thought about it, yes. Did I practice
20 anything to remember, no.
21 Q. So there were no documents that you reviewed
22 between then, that is November of 2003, and first
23 speaking to RARE's attorneys that helped you refresh you
24 memory; is that right?
25 MR. GILLIS: Objection, that's not a fair

1 A. I don't recall.
2 Q. And it's your best memory that -- well, so he
3 may have brought a beer with him from the bar; is that
4 right?
5 A. I don't recall.
6 Q. Back two and a half years ago, it was your
7 memory that he had had three Manhattans; is that right?
8 MR. GILLIS: Objection.
9 A. Yes.
10 Q. So back then, what was your memory of how
11 many Jack Daniels Manhattans Mr. Southworth had consumed
12 that night?
13 A. Back then, three.
14 MR. GILLIS: Objection.
15 Q. Do you have any reason to believe that your
16 memory of the events of that night is better today than
17 it was two and a half years ago, a month, a little over a
18 month after that night?
19 A. Yes.
20 Q. Your memory is better today?
21 A. I believe so.
22 Q. Tell me why your memory is better today?
23 A. I believe after reviewing the two things I
24 did, then it was they showed me the check, write a
25 statement and that was it. You know, and I remembered

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1 characterization at all.
2 MR. FARRAH: You can answer the question.
3 MR. GILLIS: No, you can't. I am going to
4 instruct her not the answer like that. There's no
5 evidence in here that we did anything to refresh her
6 recollection. If you want to ask a fair question, go
7 ahead.
8 Q. Your memory, ma'am, your memory as of the day
9 before you spoke to RARE's attorneys about how much Mr.
10 Southworth had to drink that night was as reflected in
11 your November 2, 2003 statement; isn't that right?
12 MR. GILLIS: Objection.
13 A. From how many I said e had to how many he was
14 served in here?
15 Q. Your memory as of before the time that you
16 met RARE's attorneys was that he had had three Jack
17 Daniels Manhattans that night; isn't that right?
18 MR. GILLIS: Objection
19 A. From what I could recall.
20 Q. Yes. And you recalled that a month after the
21 incident, or a month and a week after the incident; is
22 that right?
23 A. That was a month after and only looking at
24 the bill. I couldn't remember I believe accurately
25 unless I had been showed that bill that night also.

1 Q. Tell me what you remember about serving table
2 62 that night, prior to the time you cashed them out at
3 9:36?
4 A. I remembered that they were a group of guys,
5 they were a friendly group of guys that I had know --
6 Q. 62.
7 A. 62.
8 Q. 62.
9 A. I don't remember anything about 62.
10 Q. What does the document you were -- table 62
11 was the table you matched up with table 52 that night
12 isn't it? Wasn't it?
13 MR. GILLIS: Objection. At what time during
14 the night. You're talking about 62. She obviously had
15 more than one group at that table.
16 Q. You told us that you matched up table 52 and
17 62 to accommodate that nice group of guys that you just
18 mentioned; isn't that right?
19 A. Yes.
20 Q. Okay. What I want to know is, when you
21 cashed that nice group of guys out at 9:36 for table 62,
22 what had you served them?
23 MR. GILLIS: Objection. There is no evidence
24 that that was the check for the table.
25 MR. FARRAH: I think there is plenty in the

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1 Q. And stick with that page for a second. Does
2 -- what is the page number of the report that you
3 reviewed, when it starts, what page is that at the top?
4 A. Seven.
5 Q. Have you reviewed pages 1 through 6 of the
6 audit report, date of business, 9/26/2003 for your
7 activity that night?
8 A. No, sir.
9 Q. Has anyone shown it to you?
10 A. No, sir.
11 Q. Has anyone offered it to you?
12 A. No, sir.
13 MR. FARRAH: Do you have it?
14 MR. GILLIS: Go off the record for a second.
15 (Off the record.) 12:35 p.m.
16 (A lunch recess was taken.)
17 (Back on the record as follows:) 1:33 p.m.
18 BY MR. FARRAH:
19 Q. Good afternoon. Is it true that the first
20 time you saw the pages 2 through the end of Exhibit #8
21 was when you met with RARE's lawyers for the first time?
22 MR. GILLIS: Objection.
23 A. The first time I saw these?
24 Q. Yes, ma'am.
25 A. Yes.

1 record that that was the check for the table.
2 Q. What I want to know is, what did you serve
3 them?
4 A. There was nothing in this report showing what
5 I served them. So I do not remember what I served that
6 table off the top of my head; 62 I do not know.
7 Q. The report that you reviewed and the report
8 -- the report that you reviewed, ma'am, was a report that
9 was accompanied by -- did you ever see this letter
10 before?
11 MR. GILLIS: Objection.
12 Q. Just, did you ever see it?
13 A. No.
14 MR. FARRAH: Okay. Can we mark it please.
15 (DEPOSITION EXHIBIT #13 WAS MARKED
16 FOR IDENTIFICATION.)
17 Q. For the record, the report that you reviewed
18 is part of a document that was delivered to me by RARE's
19 prior counsel, under cover, that is letter dated May 18,
20 2004. What I want to ask you is, does the report that
21 you reviewed show any activity of yours prior to 7:59
22 p.m.? If you can look at Exhibit #8.
23 A. Prior to 7:59?
24 Q. Yes, ma'am.
25 A. No.

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1 Q. When is the first time you saw pages 2, not 1
2 which is the check, but pages 2 through the end of what's
3 been marked as Exhibit #8?
4 A. Yesterday.
5 Q. Yesterday. And prior to that time was it
6 your belief that Mr. Southworth was served three Jack
7 Daniels Manhattans by you at the table?
8 A. At it states on here, he had had three
9 Manhattans. It doesn't say what I had served him, so --
10 Q. My question to you is, prior to yesterday was
11 it your belief that you had served Mr. Southworth three
12 Jack Daniels Manhattans at the table?
13 MR. GILLIS: Objection.
14 A. No. I had served him two, but he had had
15 three.
16 Q. So you knew that, that was your memory prior
17 to yesterday; is that right?
18 A. Yes.
19 Q. Can I ask you why you didn't write that, that
20 is that you had served him two and he had had another
21 one, when you wrote out for the police on November 2,
22 2003 whatever you wrote out?
23 MR. GILLIS: Objection.
24 A. I don't know why.
25 Q. You had at that time, when you wrote out for

1 the police whatever you wrote out, you had the check
 2 which is the first part of the Exhibit #8 available to
 3 you; isn't that right?
 4 A. Yes.
 5 Q. Can I ask you why you wrote at that time on
 6 Exhibit #8 that there were about eight men?
 7 A. Excuse me. Because I believed then that the
 8 table may have been set up for more, but only a certain
 9 amount had sat.
 10 Q. Can I ask you why you wrote on November 2,
 11 2003 they all had chowder and bread?
 12 A. I may have not seen the check, but I knew
 13 chowder was at the table.
 14 Q. Can I ask you why you wrote they all had
 15 chowder and bread?
 16 A. I do not know why I would have wrote that.
 17 Q. That was wrong, wasn't it?
 18 A. Yes.
 19 Q. It was wrong that there were eight men; isn't
 20 that right?
 21 A. Yes.
 22 Q. Now, a little earlier today I asked you how
 23 many meals were served and you said six; is that right?
 24 A. Yes.
 25 Q. Did you also say that you believe that one of

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1 Q. That is what you remember testifying earlier
 2 today?
 3 A. That is what I remember.
 4 Q. So it's now your testimony that somebody
 5 ordered the chicken fingers as a meal?
 6 MR. GILLIS: Objection.
 7 A. I had said that earlier, yes.
 8 Q. Is it your testimony that somebody ordered
 9 the chicken fingers as a meal?
 10 A. From what I recall, yes.
 11 Q. When did that person announce to you the
 12 chicken fingers would be his meal?
 13 MR. GILLIS: Objection.
 14 A. The may have taken them as I brought them as
 15 an appetizer and kept them for himself only, and that
 16 would have been his meal.
 17 Q. What is your basis for saying that the person
 18 ordered the chicken fingers as his meal?
 19 A. Because I remember that everyone at that
 20 table ate a meal. Not one person went without eating
 21 that night.
 22 Q. You only served six meals; isn't that right?
 23 A. Yes.
 24 Q. No one ordered -- no one said to you, I am
 25 having these chicken finger as my meal; isn't that right?

1 the persons ordered an appetizer as a meal?
 2 A. Yes.
 3 Q. Which person ordered an appetizer as a meal?
 4 A. I couldn't say for sure which person.
 5 Q. Which appetizer did the person order as a
 6 meal?
 7 A. I would say the chicken fingers.
 8 Q. Do you have a memory as you sit here today
 9 that someone actually ordered the chicken fingers as a
 10 meal?
 11 A. Excuse me?
 12 Q. Do you have a memory as you sit here today
 13 that someone ordered the chicken fingers as a meal?
 14 A. Yes.
 15 Q. Didn't you tell us earlier today that they
 16 all shared the chicken fingers as an appetizer?
 17 A. It was put in as an appetizer.
 18 Q. Didn't you tell us today that they all shared
 19 the chicken fingers as an appetizer?
 20 A. I believe --
 21 Q. Did you tell us that?
 22 MR. GILLIS: Objection.
 23 Q. Do you remember it?
 24 A. I believe I had said I knew that the Tonion
 25 was shared and that I had put it in as an appetizer.

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1 A. If I came to him and the was going to order
 2 --
 3 Q. Isn't that right?
 4 MR. GILLIS: Objection, let her finish her
 5 answer.
 6 MR. FARRAH: I want her to answer the
 7 question.
 8 MR. GILLIS: No, you don't like the answer
 9 she is giving you, so you're cutting her off.
 10 MR. FARRAH: I'd just like her to respond to
 11 the question.
 12 MR. GILLIS: And she has if you'll give her
 13 the opportunity to finish her answer.
 14 Q. No one said to you, I am ordering these
 15 chicken fingers as a meal; isn't that right?
 16 A. If I came to him and he was going to order
 17 something, and he had nothing to order, he would have
 18 said, the chicken fingers are my meal. I am all set or
 19 I'm good.
 20 Q. No one said that to you --
 21 MR. GILLIS: Objection. Asked and answered.
 22 Q. Isn't that right?
 23 A. I just answered. I believe I answered your
 24 questions?
 25 Q. Did someone say to you, I am having these

1 chicken fingers as my meal; yes or no.
2 A. Yes.
3 Q. Is that what you remember now?
4 A. Yes.
5 Q. You don't remember that you told us earlier
6 that those chicken fingers were shared by everybody?
7 A. I said they were put in as an appetizer and
8 that I did not specifically see each person eat a piece
9 of each appetizer.
10 Q. You remember what you testified to earlier;
11 is that right?
12 MR. GILLIS: Objection. Have you got a
13 question that you haven't already asked that you want to
14 ask her.
15 MR. FARRAH: I just asked her that question
16 that I haven't already asked.
17 MR. GILLIS: You've asked it six times and
18 she's answered it six times. Why don't you go on to
19 another subject.
20 MR. FARRAH: That's your memory.
21 Q. Now, do you know what Mr. Southworth had to
22 drink at the bar?
23 A. I don't recall specifically, no.
24 Q. Do you know what he had to drink at the bar
25 is my question?

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1 whether or not you served him a beer at the table.
2 A. I did not serve him a beer at the table.
3 Q. Do you want to change your earlier testimony?
4 A. No.
5 Q. Who did you serve the other beer to at the
6 table?
7 A. I believe I served a beer to the gentleman
8 with the black hat and the black hair.
9 Q. We heard about him. Who did you serve the
10 other beer to at the table.
11 A. I don't recall who that one went to.
12 Q. And you don't know whether you served Mr.
13 Southworth that other beer or not, do you?
14 A. I did not serve Mr. Southworth a beer.
15 Q. You remember that?
16 A. Yes.
17 Q. Was Mr. Southworth a good tipper?
18 A. I had only waited on him the one time before.
19 With me, he was a decent tipper, yes.
20 Q. Did Sherry tell you that he was a good
21 tipper?
22 A. Yes, I believe she did.
23 Q. A very good tipper?
24 A. A good tipper.
25 Q. He carried around hundred dollar bills; isn't

1 A. No.
2 Q. Did you ever know what he had to drink at the
3 bar?
4 A. No.
5 Q. When you said you don't recall what he had to
6 drink at the bar, what do you mean?
7 A. He sat down with a drink at my table. Do I
8 remember what that was, no. If he was drinking before
9 the got to my table, I do not know what he had at the
10 bar.
11 Q. And you don't know what he brought to the
12 table; isn't that right?
13 A. I don't remember what he brought to the
14 table.
15 Q. Thank you. You can't tell us whether or not
16 he had a beer at the table that you served him, can you?
17 A. No.
18 MR. GILLIS: Objection.
19 Q. Do you know whether or not you served him a
20 beer at the table?
21 A. I did not serve him a beer at the table.
22 Q. You know whether you -- you did not served
23 him a beer at the table?
24 A. Yes.
25 Q. A moment ago you told us you couldn't tell us

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1 that right?
2 MR. GILLIS: Objection
3 A. No, I don't know that.
4 Q. He left one hundred dollar bills on the
5 table.
6 A. Because I entered one hundred dollar bill
7 does not mean that they left hundreds, because they are
8 denominations. So I'm not going to sit there and enter
9 ten dollar bills ten times. I'd rather quickly entered
10 it out one hundred, one hundred, twenty, forty.
11 Q. Why not enter 240?
12 A. Because there's not a button for a two
13 hundred dollar bill.
14 Q. Why not enter one hundred, one hundred,
15 forty?
16 A. There's not a button for a forty dollar
17 bill.
18 Q. Is it your belief the everything you did was
19 in accordance with the practice -- everything you did
20 that night was in accordance with the practices set forth
21 in the Server Guide, which has been marked as Exhibit #1
22 to your deposition?
23 A. Yes.
24 Q. It's your belief that everything you did that
25 night was in accordance with the Longhorn Server and

1 Bartender Trainee Edition, which has been marked as
2 Exhibit #3 to your deposition?
3 A. Yes.
4 Q. Have you reviewed either of these documents:
5 That's Exhibit #3 or Exhibit #1 to your deposition prior
6 to today?
7 A. No.
8 Q. So what's the basis for your belief that
9 everything you did is in accordance with the provisions
10 of these two documents?
11 A. Because I believe that while working at
12 Longhorn I worked up to the Longhorn standards and what I
13 was trained with.
14 Q. You believe you never made a mistake while
15 you were at Longhorn; is that right?
16 A. I believe I may have made mistakes.
17 MR. GILLIS: Objection.
18 Q. Did you make a mistake in serving too much
19 alcoholic beverages to Mr. Southworth that night?
20 A. No.
21 Q. Have you ever considered that you might have
22 made a mistake in serving too much in the way of
23 alcoholic beverages to him that night?
24 A. No.
25 Q. Ever?

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1 that night?
2 A. From what I believe my sec -- what I
3 remembered my section to be, I believed I was here?
4 Q. Where?
5 A. These tables right here.
6 Q. Tables 5 --
7 A. That's 52, 62. It would have been -- the
8 sections are broken up different each night depending on
9 how many servers are on. If I was in a four table
10 station, it would have been four here or four here.
11 Q. What is your memory of what you had for the
12 four that night?
13 A. I believe I said these two and these two.
14 Q. So you believe your earlier testimony was
15 that you said 53, 63, 52 and 62?
16 A. Correct.
17 Q. Your first testimony?
18 A. I believe that is what I said.
19 Q. What is your memory, whatever you said?
20 A. It was -- my memory is I had four tables in
21 that section, which exact four, I do not specifically
22 remember.
23 Q. And your memory is you served Sprite to
24 somebody at the table?
25 A. I do remember Sprite being at the table, yes.

1 A. No.
2 Q. Now, was anyone at that table drunk that
3 night?
4 A. No, not in my opinion.
5 Q. Was anyone at the table under the influence
6 that night?
7 A. Not in my opinion, no.
8 Q. Are you aware of the fact that one of the
9 people at the table testified the was drunk at the table
10 that night?
11 MR. GILLIS: Objection.
12 A. I am not aware of that.
13 Q. You didn't see anybody that was drunk?
14 A. No.
15 Q. Were you looking?
16 A. Yes.
17 Q. Where is table 51, do you know?
18 A. It is a booth against the wall, against the
19 kitchen.
20 Q. Where?
21 A. Right here.
22 Q. Did you have -- could you mark 51, I'm sorry,
23 on Exhibit #12.
24 A. (Complies.)
25 Q. Did you have responsibility to serve table 51

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1 Q. Do you have any explanation for why no Sprite
2 is shown on Exhibit #8?
3 A. There -- it may have been brought from the
4 bar, and refills are for free, so I wouldn't have charged
5 them again. Or I simply didn't ring in a drink.
6 Q. Do you have a memory that it was brought from
7 the bar and refills are free?
8 A. Yes, refills are free.
9 Q. Do you have a memory that night of someone
10 bringing a Sprite from the bar and you refilling it for
11 free?
12 MR. GILLIS: Objection.
13 A. No.
14 Q. Are you -- do you know what your plans are in
15 terms of shipping out? Are you -- do you know whether
16 you are staying here in North Carolina or where you are
17 going to be?
18 A. I am stationed in North Carolina until 2009
19 deployable at any time.
20 Q. Deployable at any time means you can be sent
21 out at any time?
22 A. Yes.
23 Q. On how much notice?
24 A. It's a required 30 day notice.
25 Q. Are you required to wear your uniform off

1 base?
2 MR. GILLIS: Objection. How is this supposed
3 to lead to discoverable evidence?
4 MR. FARRAH: I just want to know whether
5 she's required to --
6 MR. GILLIS: I am going to instruct her not
7 to answer. It's no way is it in any way going to lead to
8 discoverable evidence and therefore it's not a question
9 -- no.
10 MR. FARRAH: She's wearing a uniform today.
11 I think I have a --
12 Q. Why are you wearing a uniform today?
13 MR. GILLIS: No, don't answer. It's not
14 calculated to lead to discoverable evidence therefore
15 it's not a valid question.
16 MR. FARRAH: You're instructing her not to
17 answer?
18 MR. GILLIS: I am. If you want to ask a
19 question that's going to lead to discoverable evidence,
20 I'd be happy to have her answer it.
21 MR. FARRAH: I think it's a relevant
22 question.
23 MR. GILLIS: It's not relevant.
24 MR. FARRAH: We'll argue that later.
25 (Off the record.)

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1 party was at?
2 A. The very far one, 52, 62, 72, or 42, 52, 62,
3 72.
4 Q. Where is the service bar in relation to --
5 A. Straight through the alleyway -- oh, the
6 service bar, you'd go back here, down the entire back
7 alley to the other side of the restaurant.
8 Q. I'm going to show you a photograph and ask
9 you if you recognize what it depicts?
10 A. No, I don't.
11 Q. Ever see this before?
12 A. No.
13 MR. FARRAH: Could we have this marked
14 please.
15 (DEPOSITION EXHIBIT #15 WAS MARKED
16 FOR IDENTIFICATION.)
17 Q. I'm going to show you a photograph and ask
18 you if you recognize it as any portion of the Longhorn?
19 A. Yes.
20 MR. FARRAH: Could we have this marked
21 please.
22 (DEPOSITION EXHIBIT #16 WAS MARKED
23 FOR IDENTIFICATION.)
24 Q. What does Exhibit #16 show?
25 A. It shows the top of the bar, some of the

1 (Back on the record as follows:)
2 BY MR. FARRAH:
3 Q. I want to show you a photo and ask you if it
4 fairly and accurately depicts a portion of the Longhorn
5 Restaurant as it appeared to you on the night of
6 September 26, 2000?
7 A. Yes.
8 MR. FARRAH: Okay. Can we have that marked
9 please.
10 (DEPOSITION EXHIBIT #14 WAS MARKED
11 FOR IDENTIFICATION.)
12 Q. Does it show the tables that the Southworth
13 party was sitting in?
14 A. Yes.
15 Q. Could you point those tables out please for
16 us?
17 A. The one at the very far end would be 52, 62.
18 Q. And the booths, right there, that my thumb is
19 pointing to?
20 A. 51 -- 41, from what I remember, these are the
21 ones, whether it starts at 40 or 50 and goes down.
22 Q. Could you point to 41.
23 A. Whether it starts at 41 or 51, I don't
24 remember, but it goes from 41, 51, 61, 71.
25 Q. And the tables again that the Southworth

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1 condiments that go with some of the drinks. Some of the
2 margaritas are listed here. Some more of the margaritas,
3 and I can't read -- I would assume that's some of the --
4 I'm not sure what that is --
5 MR. GILLIS: We don't want you to assume. If
6 you know --
7 MR. FARRAH: Don't assume.
8 A. A wine glass, the shaker margarita glasses
9 and more wine glasses.
10 Q. And the column that says, do they ask for,
11 and then the column that says suggest, what does those
12 mean?
13 A. Did they ask for those at the time were our
14 -- when I was there at the time were -- the margaritas
15 were our promotional items at the time.
16 Q. Did Longhorn suggest that if someone asked
17 for a Texas margarita, you offer them the ultimate
18 margarita instead?
19 MR. GILLIS: Objection.
20 A. Did you --
21 Q. Is that what that means, do they ask for
22 Texas margarita, suggest ultimate margarita?
23 MR. GILLIS: Objection.
24 A. I couldn't know what they were suggesting by
25 asking that.

1 Q. You don't know what this means?

2 A. I did not see that on the bar. That wasn't

3 there when I was there.

4 Q. Okay, thank you. Did Longhorn serve -- offer

5 a Texas Tea at that time?

6 A. Yes.

7 Q. Do you know what is in the Texas Tea?

8 A. I don't recall now.

9 Q. Do you recognize that photo?

10 A. Yes.

11 Q. What does that show?

12 A. That shows another side of the alley, drinks,

13 bread, glasses are here, the dish pit and then a part of

14 the serving area.

15 MR. FARRAH: Could we have this marked,

16 please.

17 (DEPOSITION EXHIBIT #17 WAS MARKED

18 FOR IDENTIFICATION.)

19 Q. So just to wrap up, the only management at

20 Longhorn you spoke to prior to yesterday was whom, about

21 this incident?

22 A. Was Chris.

23 MR. GILLIS: Objection.

24 Q. Chris Orr; is that right?

25 A. Yes.

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1 Q. I am going to ask you some questions then

2 about your background in case you may not be here at the

3 time of trial, we may have to use this deposition. Can

4 you tell me the names of your children?

5 A. I have three children. The oldest is Markus.

6 the's eight. Tyler is five.

7 Q. Those are both boys?

8 A. Yes.

9 Q. And the third is a daughter?

10 A. Yes, Lindley, she's nine months old.

11 Q. You had mentioned earlier that 911 had a

12 particular affect on you. Can you explain that?

13 MR. FARRAH: Objection, and just on the

14 record, I would object to all of these background

15 questions as being irrelevant and not reasonably designed

16 to lead to discoverable evidence, kid's names, 911,

17 things of that nature. So that's my running objection.

18 I hope you'll accord me the same courtesy that I did you

19 in terms of your objection to my leading questions.

20 MR. GILLIS: I think it's a little different

21 if we have to use this for trial, I have the opportunity

22 to put in her background to establish her credibility. I

23 think I'm entitled to do that.

24 MR. FARRAH: Well, I disagree and I'll object

25 to this line of questioning, how's that.

1 Q. You never spoke to Chuck Bulgain about this

2 incident; is that right?

3 A. I don't recall speaking to Chuck, ever, no.

4 Q. And the only employees at Longhorn you spoke

5 with about the incident, the night in question is Sherry;

6 is that right?

7 A. Yes.

8 Q. How many times have you spoken to her about

9 it?

10 A. Specifically about the incident since it

11 happened?

12 Q. Yeah.

13 A. Occasionally, maybe three, four times.

14 Q. Is there a manager's incident log that you

15 know of at the restaurant for recording notable

16 incidents?

17 A. Not that I know of.

18 MR. FARRAH: That's it for me. Thank you.

19

20 EXAMINATION BY MR. GILLIS:

21 Q. It is afternoon now. Good afternoon, Ms.

22 Chabot. You said that you may be deployable at any time;

23 is that correct?

24 MR. FARRAH: Objection.

25 A. Yes, sir.

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1 MR. GILLIS: I honor your objection too,

2 although I for the record, disagree with that.

3 MR. FARRAH: Yeah, I don't think background

4 has anything to do with credibility.

5 Q. Getting back to the question, in the question

6 that Mr. Farrah asked you about why you went into the

7 service, you mentioned that there was a particular effect

8 that 911 had on you. Can you tell me what that was?

9 A. My mother is a flight attendant. She flew

10 out of Boston that day. And so when I had returned home,

11 you know, I had a bunch of phone calls questioning where

12 my mom was. And I didn't even know it happened, because

13 I had been out during the day, hadn't seen the news and

14 wasn't paying attention to the radio. So I really didn't

15 know and didn't know what happened to her for a few days

16 until she was finally allowed to call out to me.

17 Q. Had you already made a decision before then

18 at sometime further in your life you wanted to join the

19 service?

20 A. Yes.

21 Q. Did that expedite it at all?

22 A. Absolutely.

23 Q. Since that happened in '01, why didn't you

24 join earlier?

25 A. We had had the children and they were too

1 young and I felt that if I did get deployed right away or
2 went to training for four to six months that they were
3 too little for my husband to handle on his own.

4 Q. And you've been in the service now just under
5 two years; is that correct?

6 A. Yes.

7 Q. Have you been given any commendations or
8 medals while you've been in the service?

9 MR. FARRAH: Objection.

10 A. When we graduate from basic, we get one of
11 our ribbons --

12 Q. Let me rephrase the question. Have you been
13 given any awards since you've been in the service?

14 MR. FARRAH: Objection.

15 A. I've gotten a star major coin and I've gotten
16 an ARCOM.

17 Q. Can you explain what those are for?

18 A. The ARCOM was for outstanding achievement at
19 the tact center, holding an OIC's position being an E1,
20 which is coming in with no rank.

21 Q. Okay, can you explain for us lay people what
22 all that initials mean?

23 A. There's a captain will run the tact center,
24 and of course she's an officer. She's not enlisted. And
25 doing as well as I did in the tact center, they put me in

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1 police into another field because me having children, the
2 didn't want -- the knew that it was a high probability
3 I'd get deployed right after training.

4 Q. Has your unit been deployed?

5 A. Yes, twice and they just got back from their
6 second deployment.

7 Q. Have you yourself been deployed?

8 A. No.

9 Q. Can you tell us why you weren't deployed as
10 part of the unit?

11 MR. FARRAH: Objection.

12 A. I had joined the unit in October. They were
13 set to deploy in February. I was pregnant so I wasn't
14 able to deploy with them, but after my daughter was born,
15 I was scheduled to deploy two months later.

16 Q. Did you go over at that time?

17 A. No, I did not.

18 Q. Why was that?

19 A. My daughter was born with an extremity rare
20 congenital heart defect, which required surgery at five
21 days old, so I became nondeployable at that time due to
22 family medical problems.

23 Q. What was the problem?

24 A. My daughter needing the open heart surgery
25 which required she was hospitalized for four weeks and

1 her position and took her appointments and did things
2 that she would be overseeing and doing in the center I
3 was able to do.

4 Q. What division are you in?

5 A. I'm in 16th MP Brigade, XVIII Airborne Corps.

6 Q. Can you explain what the Airborne Corps is.

7 MR. FARRAH: Same running objection to the
8 relevancy of these, Mike.

9 MR. GILLIS: I understand.

10 A. The Airborne Corps is all trained in Airborne
11 operations, Airborne qualified.

12 Q. You joined up specifically to be military
13 police; is that correct?

14 A. Yes.

15 Q. Why did you do that?

16 A. That was a field I was always interested in,
17 even in the civilian field. And I figured if I combined
18 it with military and civilian, that was what I was
19 interested in.

20 Q. Were you aware of the likelihood of military
21 police being activated in 2004 when you joined?

22 A. Absolutely.

23 Q. What was your understanding?

24 A. That they extremely hi -- highly deployable.

25 The recruiter actually tried to talk me out of military

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1 then she had a recovery time of three months.

2 MR. FARRAH: You know I'm objecting to all of
3 this?

4 MR. GILLIS: Yes, I understand.

5 A. The surgery was May 25.

6 Q. And when was she born?

7 A. May 20.

8 Q. She was five days old?

9 A. Yes.

10 Q. Has she had any surgeries since?

11 A. She did. She had an operation the beginning
12 of January of '06.

13 Q. What is her condition now?

14 A. Now she is fully recuperated from that
15 surgery.

16 Q. Now that she is fully recuperating, are you
17 able to be deployed at any day now?

18 A. Yes.

19 Q. Are you only deployable when your group out
20 again or can you be deployed with a different group?

21 A. I can be deployed with anybody.

22 Q. Explain how that works.

23 A. There are, in 16th MP Brigade, five
24 deployable units and they're all combat units and they
25 strictly train, deploy, come back, train, deploy. And

1 then there's one Garrison Unit. Right now I'm in the
2 Garrison Unit, but if one of those line units was to need
3 me for a mission, I would be drafted there and then leave
4 with them.

5 Q. If you were drafted into another unit, what
6 position would you hold when you were activated?

7 A. Military police officer.

8 Q. Your position doesn't change?

9 A. No.

10 Q. Your current rank is what?

11 A. Specialist.

12 Q. Do you have any -- in addition to the awards
13 that you had mentioned earlier, do you have any specific
14 certifications for shooting, whatever for example?

15 A. We have -- we are one of the only fields who
16 have to qualify with our 9mm, which we qualify for --
17 that's our expert badge that I received. We're qualified
18 in OC training.

19 Q. Which is what?

20 A. OC spray, we are able to use that. Anything
21 that a police officer has to be certified in, we go
22 through the same training. It's called LTLEA (phonetic).

23 Q. In the meanwhile while you're not deployed,
24 what do you know?

25 MR. FARRAH: Objection.

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1 Q. Is that response to --

2 A. Hurricane Katrina. Yes.

3 Q. Now, getting back to your training at
4 Longhorn, how many training sessions did you have at
5 Longhorn before you actually served a table?

6 A. We had a whole week of consecutive nightly
7 training. It was during the nights, I would say from
8 5:00 on, probably until about 11:00.

9 Q. This was when?

10 A. Before the restaurant even opened.

11 Q. Late December of 2000, would you think?

12 A. Yes.

13 Q. How long were the sessions, of the training
14 sessions?

15 A. About six to seven hours.

16 Q. Per session.

17 A. Per night.

18 Q. How many nights would you have to train?

19 A. At least a week's worth.

20 Q. Once you were trained, did you start out with
21 three or four tables or did you start out with less than
22 that?

23 A. We started out with two tables.

24 Q. Why was that?

25 A. There were -- because it just started. They

1 A. We do the garrison work on post. We do the
2 same thing in the city, but we do it our post. We do the
3 patrols --

4 Q. Let me ask the question a different way. Are
5 you deployed currently?

6 A. No.

7 Q. While you are not -- what are you currently
8 doing in the service as a part of your job?

9 A. I work as a police officer.

10 Q. Can you tell us what that entails?

11 A. Patrolling post, responding to calls, working
12 the desk, working the RTO, taking calls.

13 Q. Where are you doing this?

14 A. On Fort Bragg.

15 Q. What is your husband's name?

16 A. Ronnie.

17 Q. What does he do for work?

18 A. He is a carpenter. He is contracted out
19 through a company in Massachusetts that's got a contract
20 through FEMA, and he travels and he does disaster relief
21 work.

22 Q. Can you explain what disaster relief work is?

23 A. Mainly he works through the hurricane
24 seasons. He worked in Miami recently for a few months,
25 and then did a month in New Orleans and came back.

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1 knew it was going to be a busy restaurant. A lot of
2 people were there even new to waitressing. So they had
3 the trainers in there following us around all night for
4 at least the first month, and staying on top of us, make
5 sure we were doing it the Longhorn way.

6 Q. The date of the accident was September 2003,
7 you are aware of that; correct?

8 A. Yes.

9 Q. How many years experience had you had prior
10 to that as a waitress serving food and alcohol?

11 A. Five years.

12 Q. How many years experience did you have when
13 you came to Longhorn?

14 A. Almost three years.

15 Q. What training did you receive from Longhorn
16 other than the alcohol training you've already testified
17 to?

18 A. Just general training regarding food. They
19 taught us about the steaks, the side dishes, the salads.
20 They taught us how the whole kitchen worked, how the
21 whole front of the house worked, how the hostesses would
22 work.

23 Q. Mr. Farrah asked you earlier about the bar
24 code system. Can you tell us what you remember about the
25 bar code system, what you learn through them?

MR. FARRAH: Objection.

A. I remember from -- through the bar code system it --

Q. Let me ask you a different question since it has been objected to. Did you take bar code training?

A. Yes.

Q. Can you tell us what that entailed?

A. It entailed -- we went through a booklet that had tests and it had a system, kind of to guide us through on how we should take things. And like the -- I believe there was like three steps. I think they went by like a traffic light type thing, red light, green light, yellow light.

Q. Can you explain those steps for us.

A. Green light would be where you know, you've got a perfectly -- someone just walks in, hasn't had anything to drink, perfectly -- has all of their senses intact.

Yellow light, you know, after a couple of drinks they may be reacting some way to them. And then red light, where you obviously have noticed significant changes in their behavior and have decided to stop serving them.

Q. Can you explain for me if there are differences among different people as to these various

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changes in behavior?

A. Yes.

Q. In addition to the bar code training in those monthly meetings that you had at Longhorn, what issues were arose concerning the service of alcohol?

A. Anything that a bartender may have an issue with, specifically it may be if we are taking too long to pick up our drinks, or if maybe we're hounding on them that we need our drinks, that they are taking too long. They try and make us understand, you know, from their point of view.

Q. Can you describe for me what type of a restaurant the Longhorn is, the one you worked at in Leominster, Massachusetts which is the subject of this litigation?

MR. FARRAH: Objection.

A. I would say it's more of a --

Q. Let me ask it again. You worked at the Longhorn in Leominster; correct?

A. Yes.

Q. Can you describe it for me?

MR. FARRAH: Objection.

A. It was more of a dining establishment than -- I would say more of an upscale casual dining atmosphere rather than an Applebee's and a TGIFriday's or something.

zones?

MR. FARRAH: Objection.

A. Yes. I would say so.

Q. What are they?

MR. FARRAH: Same Objection.

A. Someone could just get glossy eyes and appear to be tired or outspoken when they are not normally outspoken, or quiet when they are not normally quiet.

Q. If someone exhibited changes in behavior, what did that indicate to you based on your training?

MR. FARRAH: Objection.

A. That the alcohol was starting to take some sort of affect on them.

Q. How would you know whether or not their behavior was beginning to change?

MR. FARRAH: Objection.

A. Usually when we greet a table, we're taught to greet them and introduce ourselves, try and find out something about them, even what they did that day, what were you out doing today. Something to that affect, tell them about the specials, they would ask questions about the specials, so by the time we at least got a drink or an appetizer order, we have spoken with them for at least a few minutes.

Q. Is that the baseline from which you determine

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Q. What do base that opinion on?

MR. FARRAH: Objection.

A. Having experience in the restaurant business, working in two separate restaurants. The customers we have in there are more familiar, couples coming in there.

Q. Do you consider this to be a gin mill?

MR. FARRAH: Objection.

A. No.

Q. Do you know what a gin mill is?

A. Yes.

Q. Are there any in the area of the Leominster Longhorn?

A. I would say there's a few.

Q. Such as?

A. There is Slatery's, I would say. There's another Chinese restaurant down the street.

Q. Do you know the name of that?

A. Chop Sticks, I believe. There is another one that is almost a club down in Leominster.

Q. If I wanted to go out and get drinks during the evening as opposed to just sit and have a nice dinner, where would I go in your opinion?

MR. FARRAH: Objection.

A. Just to have drinks?

Q. Yes.

1 A. More one of the bar type atmosphere ones. I
2 wouldn't say it was a place to just come and drink.
3 Q. There was a bar at Longhorn; correct?
4 A. Yes.
5 Q. Was there a bar crowd that normally came into
6 the bar routinely?
7 MR. FARRAH: Objection.
8 A. No.
9 Q. Can you tell me what you base that on?
10 A. Working there for four years and seeing the
11 crowds that come in. The bar was usually, if we're
12 running a wait or some guys just want to come in and grab
13 lunch, you know, even if it's workers -- you know,
14 construction guys, they come in, might eat at the bar
15 because they're by themselves, and then run out real
16 quick during their lunch.
17 Q. Based on your experience at Longhorn in the
18 evenings when you worked, what did the bar crowd consist
19 of?
20 A. People waiting for tables.
21 Q. Do you know Christen O'Donnell?
22 A. Just from working with her.
23 Q. When you worked with her, did you form an
24 opinion as to her abilities as a bartender?
25 MR. FARRAH: Objection.

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1 Q. Can you describe his -- Mr. Southworth, his
2 demeanor the several times you served him at the
3 Longhorn?
4 MR. FARRAH: Objection.
5 A. Just out of the times I know of him coming
6 in, and the time I waited on him, he was a friendly kid.
7 He wasn't overly outgoing. If you talked to him, he'd
8 talk back, but he wasn't one to initiate anything.
9 Q. Who at the table was ordering the drinks, the
10 rounds?
11 A. Mainly it was the gentleman in the black hat
12 with black hair.
13 Q. Did Mr. Southworth order any rounds from you
14 directly?
15 A. Directly, no.
16 Q. In your direct examination with Mr. Farrah,
17 he asked some questions about policies and procedures.
18 Do you remember those questions?
19 A. Yes.
20 Q. What was your practice -- what was the
21 practice of Longhorn when you worked there as to when a
22 bartender would come and talk to you about a particular
23 patron. Was there a reason for them to do that?
24 MR. FARRAH: Objection.
25 A. Yes, if a bar --

1 A. I do. I believe she was a good bartender.
2 She was responsible.
3 Q. Let me ask you the next question, what was
4 your opinion?
5 A. She was a good bartender.
6 MR. FARRAH: Same objection.
7 Q. Turning my attention briefly to the night of
8 September 26 and ask you about the particular night. Did
9 you see Mr. Southworth get up from the table at all that
10 evening?
11 A. I did.
12 Q. When?
13 A. He got up at one point, I believe probably
14 from what I believe to be halfway through the meal, went
15 to the restroom.
16 Q. You specifically remember that?
17 A. Yes.
18 Q. Did you make any observation of him going to
19 the men's room?
20 A. Nothing that would make me standout.
21 Q. Was there anything in his behavior when he
22 got up to go to the men's room that would cause you to
23 believe that he may be under the influence of alcohol?
24 A. No.
25 MR. FARRAH: Objection.

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1 Q. Let me ask the -- what would be the reason
2 that a bartender might talk to you about a patron?
3 MR. FARRAH: Objection.
4 A. If they had any concerns that maybe that
5 person shouldn't have any more to drink. Or if that
6 person had anything for them to be concerned about. If
7 they had asked him -- if she had served them a drink but
8 didn't put on the bill, she would certainly come over and
9 say, hey, he did have a beer from me, put it on his bill.
10 And we'd just hit, do not make, and then it would come up
11 at the bar, do not make, and she'd know not to make it.
12 Q. Was there a mechanism at the Longhorn for you
13 to input a drink at the request of the bartender, so that
14 it would come out and be charged to the bill but not be
15 served at the bar?
16 A. For?
17 Q. Let me rephrase it. You mentioned that there
18 were occasions where a bartender would tell you to put a
19 drink on that they hadn't had the opportunity to put on
20 at the bar; correct?
21 A. Correct.
22 Q. You would input that into the computer?
23 MR. FARRAH: Objection.
24 A. Yes.
25 Q. When you input a drink on the computer, does

1 it come out on the bill?
2 MR. FARRAH: Objection.
3 A. No. The drink comes out on the bill.
4 Q. How does a drink come out on the bill that is
5 not -- does not come out of the service bar?
6 MR. FARRAH: Objection.
7 A. The drink would come up at the service bar,
8 but printed right on the little -- under it, it would
9 say, do not make. We have to type that in. There is
10 like a little typ -- a little pad on the computer, we
11 write it in. And anything that is written in will not
12 show up on the bill.
13 Q. Let me ask it a different way. What is the
14 mechanism for putting a bill on the drink -- a drink on
15 the bill so that it is on the bill charged, but not
16 poured?
17 MR. FARRAH: Objection.
18 A. Do not make.
19 Q. Has that ever happened with you?
20 A. Yes.
21 Q. Is it a common or uncommon practice?
22 MR. FARRAH: Objection.
23 A. Not very common.
24 Q. In all of the time, the three years that you
25 -- well, strike that.

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1 would not leave it at the table while you still had some
2 left.
3 Q. Could I give you the drink with some left to
4 get the next drink?
5 MR. FARRAH: Objection.
6 A. Yes.
7 Q. In your -- I believe you worked at Longhorn
8 for just over three years; correct?
9 A. Yes.
10 Q. In the time period that you worked at
11 Longhorn, do you have a memory of ever giving somebody a
12 drink and leaving another drink in front of them?
13 A. No.
14 Q. Do you know if that ever happened to you?
15 MR. FARRAH: Objection.
16 A. No.
17 Q. Did it happen on September 23, 2003 at the
18 Southworth table?
19 A. No.
20 Q. Now, you had mentioned earlier in response to
21 Mr. Farrah's questions that there was several people that
22 came from the bar; correct?
23 A. Yes.
24 Q. Do you remember what they were wearing when
25 they came from the bar?

1 What was your practice about when you would
2 take an order of drinks from people who already had
3 drinks at the table?
4 A. If they already had drinks at the table,
5 their drink would have to be empty or very close to empty
6 to the point if I knew I was returning with a drink it
7 would be empty by the time I got there.
8 Q. Was there a policy in place at Longhorn as to
9 when you were allowed to take the next drink order to
10 people who already had a drink.
11 A. Not when we took the order no, but they were
12 not allowed to have two drinks in front of them.
13 Q. If I had a drink with something in it, and
14 you were bringing me my next drink, would you serve that
15 drink to me?
16 A. No.
17 MR. FARRAH: Objection.
18 Q. Why not?
19 MR. FARRAH: Objection.
20 A. That was Longhorn policy.
21 Q. What would I have to do or what would you
22 have to do in order for me to get that next drink?
23 A. I would either bring the drink back to the
24 bar and leave it there until your drink was done, or wait
25 until you were done with it, and then leave it. But I

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1 A. They were wearing casual dress clothes,
2 T-shirts, hats, pants, sneakers, boots.
3 Q. I am talking about the three who had the
4 drinks, were those the three who --
5 MR. FARRAH: Objection.
6 A. Yes.
7 Q. The people -- let me rephrase the question.
8 The people who brought drinks to the table, do you
9 remember what they were wearing?
10 A. I remember specifically Mr. Southworth
11 because he was in my point of view mainly, most of the
12 time and he just had a shirt with some sweat pants and
13 boots.
14 Q. He was one of the people who brought a drink
15 from the bar?
16 MR. FARRAH: Objection.
17 A. Yes.
18 VIDEOGRAPHER: Can we go off the record
19 please to change tapes.
20 (Off the record.)
21 (Back on the record as follows:)
22 BY MR. GILLIS:
23 Q. Back in September of 2003 what was your
24 practice when you took the initial order for appetizers
25 and drinks at the table?

1 A. If I took an order for drinks and appetizers,
 2 it would be to put the drinks and appetizers in right
 3 away. Get that first round out to them, so they have a
 4 drink in front of them, and get some bread and appetizers
 5 out to them after that.

6 Q. Why do you do it in that order?

7 A. So that the person's not sitting there at the
 8 table with nothing.

9 Q. Do you bring the menus or are they already
 10 there?

11 A. They are already there.

12 Q. How do they get the menus?

13 A. The hostess brings them.

14 Q. Do they get the menus when they are seated?

15 A. Yes.

16 Q. Do you remember how many hostesses were on
 17 back in September 2003 on Friday night?

18 A. I don't remember specifically, but they'd
 19 usually three or four.

20 Q. How many managers were on on a Friday night
 21 back in September 2003?

22 A. At least two.

23 Q. Could there be more than two?

24 A. Yes.

25 Q. You mentioned earlier that the managers touch

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1 A. Yes.

2 Q. Have you ever gone to a manager for a
 3 situation?

4 A. Absolutely.

5 Q. What types of situations?

6 A. People upset about their food taking too
 7 long. People upset about how it's cooked, drinks taking
 8 too long.

9 Q. So your practice back in September of 2003
 10 was that after you seat them, you get the appetizers and
 11 the drinks; correct?

12 A. Yes.

13 Q. Usually, how long would it take you to get
 14 the appetizers out?

15 A. The appetizers was anywhere -- if it was
 16 soup, it would be on me, so usually the soup doesn't take
 17 long at all. But any appetizers ordered could take up to
 18 15 minutes.

19 Q. When you say it's on you, can you explain
 20 that?

21 A. I go back and put the soup in a cup and bring
 22 it out to them.

23 Q. The soup is already out there where you have
 24 access to it?

25 A. Yes.

1 the table, do you remember stating that?

2 A. Yes.

3 Q. Can you explain what touching the table
 4 means?

5 A. One manager is assigned specifically to the
 6 floor that night, and their job basically is to
 7 consistently make sure that the hostess -- the table up
 8 front, the hostess stand is going how it's supposed to be
 9 going, they're keeping up with their times, and to walk
 10 through the restaurant and greet each table that's sat
 11 down, or at least stop by that table and ask how their
 12 meal was that night.

13 Q. Each time that it's reset they would do that?

14 A. Yes.

15 MR. FARRAH: Objection.

16 Q. You had mentioned in response to Mr. Farrah's
 17 questions that you made certain judgment calls; correct?

18 A. Yes.

19 Q. If you had a question about a patron, for any
 20 reason, was there a policy in place as to what you could
 21 do?

22 A. You -- it was open door. You could go to the
 23 manager right away.

24 Q. Is that what you were instructed?

25 MR. FARRAH: Objection.

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1 Q. Just take a ladle and put it in?

2 A. Yes.

3 Q. So if people ordered -- that night, I'll call
 4 the table the Southworth table. If the Southworth table
 5 ordered clam chowder, that would come out immediately?

6 A. It could, but usually if there is other
 7 appetizers I would just bring them all together.

8 Q. As part of the bar code system that you were
 9 trained in at Longhorn, can you tell us if it discussed
 10 at all the effects of food on alcohol?

11 A. Yes, it did.

12 Q. What did it explain to you?

13 A. It explained to us that more fatty foods,
 14 heavier foods slow down the effects of alcohol on the
 15 body. And you know, if someone is not eating, but they
 16 are drinking drinks pretty quick, it's going to have
 17 effect on them right away, because it's soaking into
 18 their blood stream right away. But alcohol with food
 19 kind of slows everything down.

20 Q. Does it effect the -- Does it effect whether
 21 or not they become intoxicated or does it just affect the
 22 rate at which the alcohol absorbs into their system; what
 23 you know from your training?

24 MR. FARRAH: Objection.

25 A. The rate of which it's absorbed into your

1 system.

2 Q. Okay, let me rephrase the question. Based on
3 your bar code training, how does giving someone food
4 affect their intoxication from the alcohol they may be
5 drinking?

6 MR. FARRAH: Objection.

7 A. It's going to affect the rate alcohol is
8 absorbed into their system.

9 Q. Does it make them less intoxicated if they
10 get to that point?

11 MR. FARRAH: Objection.

12 A. No.

13 Q. And you're aware of that?

14 A. Yes.

15 Q. Do you have any other training outside the
16 restaurant that -- concerning alcohol consumption at all?

17 MR. FARRAH: As of September 26, 2003?

18 Q. As of 26, 2003.

19 A. After the fact?

20 Q. Before the fact?

21 A. Before the fact. Just the training we got
22 briefly at J&B's.

23 Q. What did that consist of?

24 A. That was a more casual training setting
25 compared to the extensive training we had at Longhorn.

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1 Q. The first full round, we'll call it the seven

2 --

3 A. When I ordered seven together?

4 Q. Yes.

5 A. I don't recall how long it would have been.
6 But I don't believe I would have served them before they
7 got their salads.

8 Q. Why is that?

9 A. There having -- There drinking a round. It
10 would have been too quick to have a round right with --
11 they drink a round and then have another round still with
12 their appetizers.

13 Q. If you had ordered the seven and you went
14 back to the table and only three had finished, what would
15 you have done?

16 MR. FARRAH: Objection.

17 A. Waited to either serve those three and held
18 the other four back, or held all seven back until all
19 seven were ready for their drinks.

20 Q. In September 26, 2003 was your practice
21 concerning -- strike that.

22 You've already testified that back in
23 September of 2003 your practice when someone sat down was
24 to get their drinks right away when they initially sat
25 down; is that correct?

1 It was a more on the floor at your own judgment, but we
2 did have a small booklet we went through.

3 Q. Do you remember whether or not the people who
4 brought drinks from the bar that night, their drinks were
5 full when they got to the table?

6 A. I don't recall.

7 Q. Now, you testified earlier that you put in
8 another order about 11 minutes thereafter; correct?

9 A. Yes.

10 Q. That is based on reviewing the audit report;
11 is that correct?

12 A. Yes.

13 Q. Did you have any independent knowledge of
14 that before you reviewed that audit report?

15 A. No.

16 Q. By the way, when was the first time you saw
17 that audit report?

18 A. Yesterday.

19 Q. Is that audit report consistent with your
20 memory as to how many drinks you served Mr. Southworth?

21 MR. FARRAH: Objection.

22 A. Yes.

23 Q. Do you remember how long it took to serve
24 that next round of drinks to the table?

25 MR. FARRAH: The 8:51 round?

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1 A. Yes, sir.

2 Q. We are now on to that second round which was
3 seven Manhattans at the Southworth table. Did your
4 practice for a second round of drinks differ at all from
5 your practice when someone first sat down at the table?

6 MR. FARRAH: Objection.

7 A. The second round wasn't as rushed --

8 Q. Did it affect it, yes or no?

9 A. Yes.

10 Q. Excuse me, was it different?

11 A. Yes.

12 Q. How was it different?

13 MR. FARRAH: Same objection.

14 A. I wouldn't rush to go get the drinks, because
15 I know they already have food in front of them.

16 Appetizers, if not appetizers, they at least had bread in
17 front of them. They were occupied with something. They
18 weren't at the table with nothing to eat or drink.

19 Q. Subsequent to that you brought food to the
20 table; is that correct?

21 A. Yes.

22 Q. Later on in the evening you brought a final
23 round of drinks; correct?

24 A. Yes.

25 MR. GILLIS: Go off the record for a second.

(Off the record.)

(Back on the record as follows:)

BY MR. GILLIS:

Q. Exhibit #8, when you were at Longhorn you knew what this first page was; correct?

A. Yes.

Q. What does that first page represent?

A. The check from that night.

Q. Is that something you would normally print out for the people at the table?

A. Yes.

Q. Is that the check for the Southworth table?

A. Yes.

Q. Do you remember serving that table anything that's not included on that check?

A. Just the Sprite.

Q. Have you ever picked up a check where people have left an amount of money that included the tip and the charges?

MR. FARRAH: Objection.

A. Yes.

Q. In September of 2003 was it a practice of -- have you ever picked up a check that people just left the money on the table and left?

A. Yes.

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drinks; do you remember that?

A. Yes.

Q. Now, there are two entries here, at 9:21 and I believe 9:24; is that correct?

A. Yes.

Q. I am referring now to the entries of drinks; is that correct?

A. Yes.

Q. What are the two entries?

A. It's four Jack Daniels Manhattans, and then at 9:24, three Jack Daniels Manhattans.

Q. Do you have an explanation why you have a total of seven, but they're put in three minutes apart?

A. The only explanation I have is that they ordered them that way. Three might have been ready for a drink and the other four weren't, and then shortly right after the four were ready. Or I put in three and then logged out and then put in four more.

Q. What is the total number of years that you've spent waitressing where you've, while you were waitressing, you would serve alcoholic drinks as well?

A. The whole time I've waitressed, which -- six years.

Q. Have you ever in your six years served drinks three minutes apart to the same person?

Q. If you -- back in September of 2003, if you didn't have to make change for a table, were you required to put the check immediately in the computer?

A. No.

Q. Have you ever held onto the check until it was less busy to put it in?

A. Yes.

Q. Do you know whether or not you did that on this evening?

MR. FARRAH: Objection.

A. Not particularly.

Q. Mr. Farrah has asked you several questions about another table; do you remember that?

A. Yes.

Q. Do you remember any of the people from the Southworth table being charged for that other tab that he spoke about earlier in the deposition?

A. No.

MR. FARRAH: Objection.

Q. If that were part of their bill, would it be included on the front page of Exhibit #8?

MR. FARRAH: Objection.

A. I would assume so, yes.

Q. Now, I want to point your attention to what has been referred to earlier -- the third round of

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A. To the same -- No.

Q. How far is the computer that you input these drinks from the table?

A. There is different computers all throughout the restaurant.

Q. How many computers?

A. Four of them that I remember that we have access to.

Q. Where is the closest in relationship to the table where the Southworth party was sitting?

A. Right behind it.

Q. Okay, if you were standing at the computer importing something, could they talk to you from the table?

A. Absolutely.

Q. I am going to show you what has been put in by Mr. Farrah as Exhibit #14 to your deposition. And I would like for you, if you could, to hold up the picture and point to the table and the closest computer terminal, if you know?

A. Their table is right here, and the computer is right there.

Q. So what's that about four feet?

A. If that, yes.

Q. Have you ever had an occasion before then

1 where you put one order in in two separate segments?
2 A. Yes.
3 Q. Is that a common practice?
4 A. Yes.
5 Q. Exhibit #13 that Mr. Farrah showed you, have
6 you ever seen that exhibit before today?
7 A. No.
8 Q. So you're not aware of Plaintiff's in this
9 case filing a separate lawsuit against Mr. Southworth?
10 A. No.
11 Q. When you brought that last round of Jack
12 Daniels Manhattans, do you remember if all of them were
13 drank that evening?
14 A. I don't know if all of them --
15 MR. FARRAH: Objection to the form.
16 Q. Do you remember bringing that last round of
17 drinks to the table?
18 A. Yes.
19 Q. Did you bring them three and four separately
20 or did you bring them all together?
21 A. I believe from what I remember I brought them
22 all together.
23 Q. Were all of them drank that evening?
24 A. Fully drank, I don't remember.
25 Q. Do you ever remember one of them not being

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1 options on the side we can check, cash, gift card, credit
2 card. And if it is cash, we are going to hit -- select
3 cash. And then it comes up with the denominational
4 buttons. And if someone hands me \$120, I am just going
5 to hit the one hundred dollar bill button and the twenty
6 dollar bill button. I am not going to enter a ten dollar
7 bill button twelve times.
8 Q. What are the denominations that you can chose
9 from on the computer at Longhorn when you were working
10 there in September of 2003?
11 A. Normal dollar bills that you'd have in normal
12 use, a one, a five, a ten, a twenty, hundred.
13 Q. So if someone gave you a hundred one dollar
14 bills, you had the option of putting in one dollar a
15 hundred times or a hundred in once, correct?
16 A. Yes.
17 Q. And do you remember how you put in the
18 amounts that evening?
19 A. No.
20 Q. Does that audit sheet show you how you
21 inputted the money that evening?
22 A. Yes.
23 Q. How did you put it in?
24 A. A one hundred, a one hundred, a twenty and a
25 twenty.

1 touched at all?
2 MR. FARRAH: Objection.
3 A. Yes.
4 Q. Can you explain to me whether or not --
5 strike that.
6 That last round of drinks, did you return any
7 of them to the bar?
8 A. Yes.
9 Q. Can you explain that?
10 MR. FARRAH: Objection.
11 A. I returned one to the bar. I remember coming
12 to the table and one person had not finished with their
13 drink. And I didn't drop it at the table, so I just
14 brought it back with me to the bar and left it there.
15 Q. Did you -- is there anything that triggered
16 your memory as to why you remember that specifically?
17 A. I remember the bartenders have a waste sheet
18 at the end of the night and it was still sitting at the
19 end of the bar because it was with their last round and
20 it was later in the evening, and Christen had said to me,
21 is this any good? And I said no.
22 MR. FARRAH: Objection
23 Q. You spoke earlier about inputting money into
24 the computer. Can you explain that process for us?
25 A. When we go to cash out the check there is

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1 Q. For a total of \$240?
2 A. Yes.
3 Q. On the bill of \$202 plus change?
4 A. Yes.
5 Q. Was that common practice for you in September
6 of 2003?
7 A. Yes.
8 Q. I want to show you Exhibit #12 that was
9 introduced here, which shows the floor plan of the
10 Longhorn. Can you point out, and why don't you take a
11 pen and circle the various computers where you could
12 input a drink for a patron to that evening?
13 A. (Complies.)
14 Q. Why don't you hold that up. How many
15 different -- why don't you point out the various places
16 where there are computer terminals where you could input
17 something.
18 A. There's a terminal here, a terminal here and
19 then in the back alley we have two. One by the dish pit
20 and one right in front of the bar.
21 Q. And the first one that you pointed out is the
22 one next to the Southworth table; correct?
23 A. Yes.
24 Q. Why would you go to one terminal as opposed
25 to another?

1 A. Mostly likely would be because the terminal
2 is closest to our section.
3 Q. Okay, but if someone was using that terminal,
4 where would you go?
5 A. The back alley.
6 Q. Going back to the audit report, the entire
7 exhibit there that's marked, had you ever seen audit
8 reports before you saw this audit report yesterday?
9 A. No.
10 Q. Is that something that is commonly provided
11 to the servers on a regular basis?
12 MR. FARRAH: Objection.
13 A. I have never seen one of those.
14 Q. Did the state police, when you gave them this
15 statement, show you the audit report?
16 A. No.
17 Q. Did that audit report refresh your
18 recollection at all today?
19 MR. FARRAH: Objection.
20 A. Yes.
21 Q. You had mentioned in response to Attorney
22 Farrah's questions that you had spoken with Christen
23 O'Donnell at the bar that evening; correct?
24 A. Yes.
25 Q. That was when you got that last -- what I am

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1 over to the table, by that I mean the three and four
2 combined, was there any question in your mind as to
3 whether or not Mr. Southworth was showing any visible
4 signs of intoxication?
5 A. None at all.
6 Q. And by none at all, you mean he was showing
7 no signs?
8 A. To me, no signs. He was acting like he
9 normally acted. He wasn't doing anything out of his
10 ordinary behavior.
11 Q. Was he slurring his words?
12 A. No.
13 Q. Was he knocking over drinks?
14 A. No.
15 Q. Did he spill any drinks?
16 A. No.
17 Q. Was he asleep at the table?
18 A. No.
19 Q. Was he glassy-eyed?
20 A. No.
21 Q. Did he act in any manner other than when you
22 had previously served him and he appeared perfectly fine
23 to you?
24 A. No.
25 Q. I am sorry. I know you answered it, but I

1 calling that last round, which is the three and the four
2 Manhattans that were ordered three minutes apart.
3 A. Yes.
4 Q. After the seven Manhattans were ordered, is
5 that when the conversation took place?
6 A. Yes.
7 Q. Did you, on the basis of that conversation,
8 examine any further whether or not these patrons were
9 showing any signs of intoxication?
10 MR. FARRAH: Objection.
11 A. I believe it raised my awareness to if they
12 had ordered any more after that, I would have seriously
13 considered it.
14 Q. Well, between the time that the drinks were
15 ordered and you brought them to the table, did you look
16 at them again?
17 MR. FARRAH: Objection.
18 A. I don't believe I did, no.
19 Q. When you brought the drinks over to the
20 table, at that time, was there any question in your mind
21 that anybody at that table showed visible signs of
22 intoxication?
23 A. No.
24 MR. FARRAH: Objection.
25 Q. When you brought that last round of drinks

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1 forgot your answer. How many times had you served him
2 prior to this occasion?
3 A. Maybe once.
4 Q. How many times have you seen him in there
5 with other waitresses, or wait staff?
6 A. I can't say exactly for sure.
7 Q. You have seen him being served by Sherry
8 before; correct?
9 A. Yes.
10 Q. You've heard Sherry comment about him;
11 correct?
12 A. Yes.
13 Q. Did you feel that you had some knowledge of
14 this gentleman before you served him that evening?
15 MR. FARRAH: Objection.
16 A. Yes.
17 Q. Is there a person -- this was not a person
18 you had served for the first time; correct?
19 A. No.
20 Q. Did you have any experience with him from
21 which you could further determine his degree of sobriety
22 that evening?
23 MR. FARRAH: Objection.
24 A. The first time I served him?
25 Q. Yes.

1 A. Yes.
2 Q. You had mentioned in response to Attorney
3 Farrah's questions that there were -- you noticed that
4 there were five checks printed that evening; correct?
5 A. Yes.
6 Q. I believe you testified you're not sure why
7 five checks were printed; correct?
8 A. Yes.
9 Q. Based on your experience and training while
10 working for Longhorn Restaurant, can you tell me as you
11 sit here today, what are the possible reasons you would
12 print five checks for a table back in September of 2003?
13 MR. FARRAH: Objection.
14 A. No other reason except for if I had tried to
15 print it and it didn't print for some reason at that
16 computer, I'd go to another terminal, try it. Or if I
17 had printed it and maybe sat the book down and had to
18 reprint it because I had put it down somewhere and didn't
19 have it.
20 Q. Okay. Have you ever printed multiple checks
21 for a table for people splitting the bill?
22 A. Yes.
23 Q. How do you do that? .
24 A. You go in and you separate it and then you
25 have to print each individual check.

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1 night with any other table?
2 A. No.
3 Q. You had mentioned earlier in response to Mr.
4 Farrah's questions the suggestive selling. Can you
5 explain what suggestive selling is?
6 A. Any specials we have, we will suggest it to
7 them or try and sell them on that fact of if they order a
8 steak, we'll ask them if they want ribs with it.
9 Q. Have you ever heard the term up-selling?
10 A. Yes.
11 Q. Can you tell me what your understanding of
12 up-selling is?
13 A. Up-selling would be if someone asked for a
14 particular -- if they ask for a screwdriver, and it would
15 just -- if we didn't up-sell it, we'd just put it in with
16 our regular house vodka, or you know, we'd up-sell, oh,
17 would you like Absolute, Kettle One, so on and so forth.
18 Try and sell them on a more premium liquor to go in the
19 drink.
20 Q. Does up-selling include in any way increase
21 in the amount of the drink or just using a higher caliber
22 liquor in the drink?
23 A. Just a higher liquor in the drink.
24 Q. By higher you mean better quality, not higher
25 volume of alcohol in the drink?

1 Q. Could you print multiple copies to give to a
2 table and let them decide if they wanted to?
3 MR. FARRAH: Objection.
4 A. Yes.
5 Q. Have you ever done that?
6 A. Yes.
7 Q. How many times did they sit around in the
8 restaurant after you served them that last round of
9 drink, if you remember?
10 MR. FARRAH: Objection.
11 A. If I remember it would have been at least a
12 half hour.
13 Q. So from -- other than seeing Mr. Southworth
14 on the news the following evening, is there anything that
15 happened on the night of September 26, 2003 that was out
16 of the ordinary, that would have jogged your memory to
17 remember this evening?
18 A. No.
19 MR. FARRAH: Objection.
20 Q. Was there anything that happened that night
21 while you were at the restaurant, before you learned
22 about Mr. Southworth on the news, that was out of the
23 ordinary?
24 A. No.
25 Q. Was there anything out of the ordinary that

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1 A. Correct.
2 Q. You gave the term vodka, rather than a bar
3 vodka, it might be Absolute or some other type of vodka;
4 is that correct?
5 A. Yes.
6 Q. Is there a difference in the price to that?
7 A. Yes.
8 MR. GILLIS: Could we go off the record just
9 a second.
10 (Off the record.)
11 (Back on the record as follows:)
12 BY MR. GILLIS:
13 Q. Back when you were working at the Longhorn
14 and specifically September 2003, do you have a memory as
15 to how much food you would serve compared to alcohol?
16 MR. FARRAH: In dollars?
17 MR. GILLIS: In dollars, yes.
18 MR. FARRAH: That would be apples and
19 oranges.
20 MR. GILLIS: That's a good point. Let me
21 just rephrase the question.
22 Q. Dollarwise, do you have a memory as to how
23 much alcohol you served in relation to the amount of
24 dollars spent on food at the Longhorn when you were
25 working there back in September of 2003.

1 A. I would say 85 to 90 percent of our sales
2 that night were food.
3 Q. That was common for you?
4 A. Yes.
5 Q. So that would mean ten to 15 percent was
6 alcohol?
7 A. Yes.
8 Q. Now, you mentioned earlier that you consider
9 this a family restaurant; correct?
10 A. Yes.
11 MR. FARRAH: Objection. I don't think she
12 said that, but go ahead.
13 Q. In this -- in that restaurant when did it
14 start to slow down normally on Friday night?
15 A. I would say about 9:30, 10:00.
16 Q. By slow down, can you describe for me what
17 you mean by that?
18 A. There wouldn't be a wait any more. I would
19 say about 30 to 40 percent of the tables had already left
20 for the night, and probably wouldn't be resat.
21 Q. How does the noise level at 10:00 compare to
22 the noise level at let's say 8:00?
23 A. There shouldn't be too much at all.
24 Q. When the restaurant is full earlier in the
25 evening, is it generally loud in the restaurant?

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1 Q. If I spoke to same at 8:00 as I did at 10:00,
2 would it resonate further in the restaurant at that time
3 period?
4 MR. FARRAH: Objection.
5 A. Yes.
6 Q. Why is that?
7 A. You're speaking over the music that they've
8 turned up to kind of dull out the noise of everybody
9 talking, the noise of everyone around you, the crowd in
10 the front waiting area of everybody waiting, the crowd at
11 the bar of everybody waiting. You're trying to speak
12 over all that to have other people hear you.
13 Q. Is most of that background noise eliminated
14 later in the evening, by later I mean after 9:30 or so?
15 MR. FARRAH: Objection.
16 A. Yes.
17 Q. Have you ever been deposed before?
18 A. No.
19 MR. GILLIS: I have no further questions.
20
21 EXAMINATION BY MR. FARRAH.
22 Q. I only have a few. What is intoxicated?
23 What does the expression of intoxicated mean to you?
24 A. Intoxicated would be -- to me it would mean
25 that someone is showing visual signs of alcohol taking an

1 A. Yes.
2 Q. Is it louder at 8:00 to 9:00 than it is 9:30
3 to 10:00 on average?
4 MR. FARRAH: Objection.
5 A. Yes.
6 Q. Do you remember when it started to slow down
7 on the night that you served Mr. Southworth in September
8 of 2003?
9 A. I remember that right before they left it had
10 already slowed down, pretty much, probably for the night.
11 Q. How long before they left had it slowed down?
12 MR. FARRAH: Objection.
13 A. Twenty minutes.
14 Q. Were you able to hear their conversation more
15 clearly at that point than earlier in the evening?
16 A. Yes.
17 Q. Do you remember the topics that they were
18 talking about?
19 A. Not in particular, no.
20 Q. Do you remember whether or not anybody at the
21 table slurring their words?
22 A. I don't remember they were, no.
23 Q. Do you remember if anybody was talking louder
24 than they had been previously in the evening?
25 A. No.

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1 effect on their system.
2 Q. Such as?
3 A. Such as slurring their words, glossy-eyes,
4 stumbling, nystagmus in their eyes.
5 Q. Did you say glossy eyes, G-L-O-S-S-Y.
6 A. Yes.
7 Q. And you said astagmus in their eyes?
8 A. Yes.
9 Q. S-T-A-G-N-E-S-S?
10 A. Nystagmus.
11 Q. Nystagmus, what is that?
12 A. Nystagmus is in your eyes when you try and
13 stare at something and you can't, your eyes can't focus
14 on it.
15 Q. And have you learned that in your training as
16 a police officer?
17 A. I've learned it again in my training as a
18 police officer.
19 Q. You learned it before that, nystagmus, the
20 word?
21 A. Yes.
22 Q. From the bar code?
23 A. No, not from the bar code.
24 Q. From where?
25 A. General knowledge, I think dealing with

1 things.

2 Q. And have you ever served 17 Jack Daniels
3 Manhattans to a table in the space of 44 minutes before
4 that night?

5 MR. GILLIS: Objection.

6 A. No, sir.

7 Q. Had you ever served 17 Jack Daniels
8 Manhattans and two 25 ounce beers to a table in the space
9 of 44 minutes before that night?

10 MR. GILLIS: Objection.

11 A. No, sir.

12 Q. Had you ever served the equivalent of 19
13 double drinks to a table in the space of 44 minutes
14 before that night?

15 MR. GILLIS: Objection.

16 A. No, sir.

17 Q. Have you ever served the equivalent of 38
18 drinks, nearly a drink per minute, to a table before that
19 night?

20 A. No, sir.

21 Q. And there was nothing unusual about that
22 night; is that your testimony?

23 A. Yes, sir.

24 MR. FARRAH: I don't have any more questions.

25
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1 EXAMINATION BY MR. FARRAH:

2 Q. I have a last question I should have asked it
3 before.

4 MR. GILLIS: I am going to object if it goes
5 beyond the scope of the redirect and recross.

6 Q. And my question is, someone did not touch his
7 drink at that table, the last drink; is that right?

8 A. Yes, sir.

9 Q. Did that indicate anything to you that that
10 person did not touch his drink?

11 A. That was one was left back on the bar, so he
12 may have finished the one he still had in front of him
13 and they never asked for it, so I thought nothing of it.

14 Q. What do you mean it was left back on the bar?

15 A. I did not serve that one to the table. So
16 instead of dumping it in the dish pit, I bring it to the
17 bar and leave it there.

18 Q. So there's one person who had a drink in
19 front of him when the last round was ordered; is that
20 right, who you did not serve?

21 A. When I brought the last order over, still had
22 a drink with some alcohol in it, so I did not serve it to
23 the table.

24 Q. And didn't finish the drink that was in front
25 of him and ask for the drink that you were bringing; is

1 EXAMINATION BY MR. GILLIS:

2 Q. Just one or two. When you factor in whether
3 or not a person is or in the red or yellow zone, do you
4 focus in on the total number of drinks served to people
5 other than the person that you're focusing in on or do
6 you just focus in on the drinks served to that one
7 person?

8 MR. FARRAH: Objection.

9 A. I don't understand.

10 Q. You're giving me a strange look. That's
11 probably an inarticulate question. You've heard Mr.
12 Farrah talk about all of these various drinks that came
13 to the table; correct?

14 A. Yes.

15 Q. There were how many people at the table?

16 A. Seven.

17 Q. How did your training and experience as a
18 waitress, did you take into account when making your
19 determinations whether or not a person is under the
20 effect of alcohol, how many drinks they had that evening,
21 or what other people had that evening?

22 A. I take into account what they've had that
23 evening.

24 MR. GILLIS: Okay, no further questions.

25
Starkings Court Reporting & Video Services

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1 that right?

2 A. I don't remember if he finally finished it or
3 not?

4 Q. Do you know who that was?

5 A. I do not know.

6 Q. Was it Mr. Southworth?

7 A. I do not know.

8 MR. FARRAH: Thank you, thank you very much.

9 MR. GILLIS: No further questions.

10 (Off the record.)

11 (And further, the witness sayeth naught.)

1 State of North Carolina

2 County of Cumberland

3

4 C E R T I F I C A T E

5

6 I, Sandra DeGarmo Wise, notary public and
7 certified court reporter, do hereby certify that said
8 witness was duly sworn prior to the examination
9 beginning, and that said examination was taken and
10 transcribed by Suzanne Thornton under my direction; and
11 the foregoing pages constitute a true and correct
12 transcription of the testimony of the witness; and that I
13 am not a relative or employee of any counsel or the
14 parties in this cause and have no interest in the outcome
15 of same.

16 In witness whereof, I have hereunto set my
17 hand and affix my official notary seal.

18

19

20

21 Sandra DeGarmo Wise

22 Notary Public - State of North Carolina

23 Nationally Certified Verbatim Reporter

24 Member: NCRA, NVRA, NCVRA

25 My commission expires: April 30, 2009

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GABRIEL & SWEENEY
COURT REPORTING

Transcript of the Testimony of:
Michael A. Marcantonio

In the Case of:
Nancy Rosario, et al
vs.
Rare Hospitality International, Inc., d/b/a Longhorn
Steakhouse

Taken on:
March 1, 2007

Gabriel & Sweeney Court Reporting

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Volume 1
Pages 1 - 235

2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 05CV-10617-MBW

3

4

NANCY ROSARIO, INDIVIDUALLY, AS
SHE IS THE ADMINISTRATRIX OF THE
ESTATE OF AWILDA SANTIAGO, ENSEN
PROBATE COURT DECKET NO.
031-2496-ADL, P/O/A VIRGINIA
ROSARIO AND CHRISTINA SANTIAGO,
AND AS SHE IS THE ADMINISTRATRIX
OF THE ESTATE OF ROSE SANTIAGO,
BERLIN (CONNECTICUT) PROBATE
COURT, CASE NO. 03-0713

5

versus

6

RARE HOSPITALITY INTERNATIONAL,
INC., d/b/a LONGHORN STEAKHOUSE

7

8

DEPOSITION OF MICHAEL A. MARCANTONIO,
taken on behalf of the Defendant, pursuant to the
Massachusetts Rules of Civil Procedure, before
Kathryn R. Sweeney, a Registered Professional
Reporter, Certified Realtime Reporter and Notary
Public within and for the Commonwealth of
Massachusetts, at the offices of Gillis &
Bikofsky, P.C., 1150 Walnut Street,
Newton, Massachusetts, on Thursday, March 1, 2007,
commencing at 10:15 a.m.

9

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Page 4

1

PROCEEDINGS

2

IT IS HEREBY STIPULATED AND AGREED by

3

and between counsel for the respective parties

4

that the deposition transcript shall be read and

5

signed by the deponent within thirty days upon

6

receipt of said transcript under the pains and

7

penalties of perjury.

8

It is further stipulated that all

9

objections, except as to form, and motions to

10

strike are reserved to the time of trial.

11

MICHAEL A. MARCANTONIO,

12

having been satisfactorily identified by the

13

production of his Massachusetts driver's license

14

and duly sworn by the Notary Public, was examined

15

and testified as follows:

16

(Exhibit No. 1, supplement to Rule 26

17

report, marked for identification.)

18

(Exhibit Nos. 2A through EE, photocopies

19

of photographs, marked for

20

identification.)

21

EXAMINATION BY MR. GILLIS:

22

Q. Could you please state your name for the record?

23

A. Michael A. Marcantonio. Anthony.

24

Q. Mr. Marcantonio, I'm here today to ask you

Page 2

1

APPEARANCES:

2

MICHAEL K. GILLIS, ESQUIRE

3

NEIL SCHNURBACH, ESQUIRE

4

DAVID BIKOFSKY, ESQUIRE

5

Gillis & Bikofsky, P.C.

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Newton, Massachusetts 02461

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9

ALBERT L. FARRAH, JR., ESQUIRE

10

One Washington Mall

11

Boston, Massachusetts 02108

12

Appearing for Plaintiff

Page 5

1

questions about a case that you've been retained

2

as an expert in.

3

If at any time you don't understand my

4

questions, just let me know, and I will try to

5

rephrase them. If at any time you need a break,

6

let me know.

7

I take it you've been deposed before?

8

A. Yes.

9

Q. Okay. So you understand the ground rules?

10

A. Yes, sir.

11

Q. Okay. And you understand the English language,

12

correct?

13

A. Yes, sir.

14

Q. So it's fair to assume that if I ask you a

15

question and you answer it, you understood the

16

question?

17

A. Yes, sir.

18

Q. Okay.

19

MR. GILLIS: Before we get started, I

20

just want to make a statement on the record that

21

based on the plaintiff filing yesterday a

22

supplemental Rule 26 response for Mr. Marcantonio,

23

I feel compelled to put on the record that this is

24

four months to the day after which we received his

Page 3

1

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2

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12

7 Audit report 129

13

8 Page 68 of Bar Code 231

Page 6

1

Rule 26 disclosure; that it is patently unfair to

2

expect us, on less than 24 hours notice, to

3

prepare for a deposition based on the supplemental

4

response; that we intend to move that it be

5

stricken based on its untimeliness; and that we

6

reserve the right to go forward with -- at a

7

further date, if the court allows you to continue

8

and allows this supplement to be -- denies our

9

motion to strike the supplement.

10

And it does not appear to us that the

11

testimony contained therein is a result of any new

12

or recently disclosed information that would have

13

precluded Mr. Marcantonio from making these

14

statements in a timely fashion four months ago

15

when the expert answers were due; and that it

16

makes it patently unfair for us, in that we've

17

already deposed all of the fact witnesses

18

concerning alcohol and the service of alcohol, and

19

we would have to go back and re-depose at this

20

point in order to address the issues that have

21

been raised at this time.

22

In addition to which, we'd have to depose

23

again Dr. Benjamin in light of the disclosure, in

24

addition to which we've -- the disclosure on its

<p style="text-align: right;">Page 7</p> <p>1 face is invalid. 2 And I just want to state that for the 3 record. 4 MR. FARRAH: Let me just have a quick 5 response, and we can get on to the business of 6 this deposition. 7 As I offered in the email to you 8 yesterday, and as I offer again, to the extent 9 that you feel you need an additional day to depose 10 him, or additional time to depose him because you 11 didn't have sufficient time to review the 12 supplemental disclosure, I have no objection to 13 that. 14 In terms of deposing fact witnesses, it's 15 my understanding that there are still fact 16 witnesses to be deposed. Mr. Sirjane and another 17 fellow who was with -- allegedly with the group 18 that night. So I don't see any -- 19 (Discussion held off the record.) 20 MR. FARRAH: And generally, I don't see 21 any prejudice here, but we can certainly talk 22 about this later. Thanks. 23 MR. GILLIS: Very briefly, you're right 24 there are two more fact witnesses who were there,</p>	<p style="text-align: right;">Page 10</p> <p>1 A. I don't believe I have. 2 Q. Well, when you say you believe, do you have any 3 reason to believe you have reviewed anything? 4 A. No, I don't. 5 Q. Let's just go over first the supplemental response 6 that's been marked Exhibit 1, which was forwarded 7 to us yesterday, February 28th, 2007. 8 You're aware of this supplement, correct? 9 A. Yes. 10 Q. Was there anything in the supplement that -- well, 11 strike that. 12 The supplement primarily deals with you 13 making certain measurements -- or attempting to 14 make measurements concerning pouring alcohol in a 15 drink glass, correct? 16 A. Correct. 17 Q. Okay. When were you first retained in this case? 18 A. That would be on my list of things that you have 19 there. 20 I don't remember the exact date that I 21 was retained. I'm sure you have that somewhere 22 which indicates the date. 23 MR. GILLIS: Let's get this marked. 24 Q. Do you recognize this document?</p>
<p style="text-align: right;">Page 8</p> <p>1 but the majority, the six other people at the 2 table, plus all the servers, plus all the managers 3 have already been deposed. 4 But that having been said, let's go 5 forward. 6 Q. Mr. Marcantonio, could you please tell me whether 7 or not you've reviewed any additional documents 8 since you filed your original Rule 26 disclosure 9 back on October 31st, which documents or papers 10 relate to this case? 11 A. I don't believe so. 12 Q. Okay. 13 A. Other than just the experiment that we did to 14 confirm what I put in my report. 15 Q. Okay. Have you reviewed any further testimony of 16 Dr. Benjamin's? 17 A. I don't believe I have. 18 Q. Well, you -- 19 A. I think -- well, actually, I did review his 20 information, but I don't know whether it was 21 before -- after my report. 22 Q. Okay. My understanding from reading your report 23 is that you reviewed an affidavit of Dr. Benjamin, 24 correct?</p>	<p style="text-align: right;">Page 11</p> <p>1 A. That's the report that I filed for the -- 2 MR. FARRAH: Do you have a copy for me? 3 MR. SCHNURBACH: (Hands document.) 4 MR. FARRAH: Thank you. What is 5 Exhibit 1? 6 MR. GILLIS: Exhibit 1 is his 7 supplemental. 8 MR. FARRAH: Okay. And Exhibit 2? 9 MR. GILLIS: Photographs. And that would 10 be 2A through EE. 11 MR. FARRAH: Okay. 12 Q. Do you recognize the document? 13 A. Yes, sir. 14 Q. What is that document? 15 A. It's a report that I filed, based on what I had 16 reviewed. 17 Q. In this case? 18 A. Yes, sir. 19 Q. Okay. That's -- I'm going to refer to that 20 document as your Rule 26 disclosure, okay? 21 A. Yes. 22 MR. GILLIS: Let's have that marked as 23 Exhibit 3. 24</p>
<p style="text-align: right;">Page 9</p> <p>1 A. Yes. 2 Q. And since your report was written before his 3 Rule 26 disclosure, can we agree that that was his 4 60(j) affidavit that was filed in this case? 5 A. I believe that's true. 6 Q. Okay. You -- 7 A. I hadn't reviewed his deposition, if that's what 8 you're -- 9 Q. All right. Have you reviewed his Rule 26 10 disclosure in this case, which was filed on 11 October 31st? 12 A. I really can't remember. I -- whatever's on my 13 report is what I reviewed. 14 Q. Okay. Your report just says an affidavit of 15 Dr. Benjamin. He's actually filed two. 16 MR. GILLIS: Perhaps, Al, you could -- 17 MR. FARRAH: I don't think he has 18 reviewed the Rule 26. 19 MR. GILLIS: Okay. 20 Q. So since November 1st you're not aware of 21 anything -- other than these photographs that have 22 been premarked as Exhibits 2A through EE, you've 23 not reviewed any other documents concerning this 24 case?</p>	<p style="text-align: right;">Page 12</p> <p>1 (Exhibit No. 3, Rule 26 report, marked 2 for identification.) 3 Q. Now, I'm going to give you 3 to look at. Can you 4 tell me, based on that document, when you were 5 retained in this case? 6 A. No, I don't think it has the date that I was 7 actually retained. 8 Q. Do you know how long before you wrote your report 9 you were retained in this case? 10 A. I would say within maybe eight or nine months. 11 Q. Okay. During that eight or nine months did you 12 have the opportunity to do the measurements that 13 you've done as stated in Exhibits 1 and 2, your 14 supplemental report and the photographs? 15 A. I never did that particular type of measurement, 16 other than my practical experience as a bartender. 17 And I always knew that a Manhattan or 18 martini straight up in that size glass was a 19 minimum of two, pharmacologically, up to three 20 drinks in one glass to fill it to that level. 21 So based on experience, I already knew 22 that, and I had done that kind of testing before 23 in the past. 24 After this report I did one of those</p>

<p style="text-align: right;">Page 13</p> <p>1 kinds of reports -- tests at any own home using 2 old granddad, and not using ice that was coming 3 from a restaurant, not using ExactoPours. 4 And I made that point to Al. 5 Q. Okay. This'll go a lot faster if you answer the 6 question. 7 MR. FARRAH: Just answer the question, 8 yes. 9 THE WITNESS: I'm sorry. 10 Q. The question was: Did you have the opportunity, 11 during the eight or nine months prior to filing 12 your report, to do the type of testing that you 13 did that's reflected in Exhibits 1 and 2 of this 14 deposition? 15 A. No. 16 Q. Why not? 17 A. Because I already knew it from experience. 18 Q. Okay. And why isn't it your experience of what 19 the amounts of the alcohol came up with? Why 20 aren't they in your report? 21 A. They are in my report. 22 Q. Your first report there? 23 A. Yes, sir. 24 Q. Okay. Where does it -- can you point out to me</p>	<p style="text-align: right;">Page 16</p> <p>1 Q. Okay. So you don't need this supplement in order 2 to render your opinion in this case, correct? 3 A. Correct. 4 Q. And you didn't draw any conclusions in this 5 supplemental report either, correct? 6 A. That I hadn't already drawn, no. 7 Q. Well, this report, and correct me if I'm wrong, 8 states what you did, but it doesn't draw any 9 conclusions from what you did, correct? 10 A. It would confirm my conclusions. 11 Maybe I don't understand your question, 12 Mr. Gillis. 13 Q. Is there any conclusion included in the 14 supplemental report, which has been marked 15 Exhibit 1? 16 A. The conclusion is that pharmacologically a 17 Manhattan is at least two to three drinks in one 18 glass. 19 Q. Okay. Where does it say that in the report? 20 A. What I just read to you. 21 Q. No, I'm saying in your supplemental report. Where 22 does it conclude in that supplemental report that 23 statement? 24 A. I don't believe it does.</p>
<p style="text-align: right;">Page 14</p> <p>1 where it has the measurements as to exactly how 2 far up in the glass a Manhattan at the Longhorn 3 Steakhouse goes? 4 A. When it's double -- when I -- on that -- if you 5 look to Page -- Point Number 6 -- in the report, 6 if you look to the one, two, third page, and where 7 it says in my opinion. Point Number 4, it says 8 that they were -- served were double and 9 potentially triple drinks in the form of 25 ounce 10 beers and the Jack Daniels Manhattans served 11 straight up in a six ounce glass filled one 12 quarter of an inch from the top. 13 Q. Okay. Why didn't you do these experiments prior 14 to filing your original report, the one that 15 you're now supplementing? 16 A. Because I didn't think I needed to, because I knew 17 from experience that that was in fact true. 18 Q. Okay. So you didn't need to do this -- 19 A. No, sir. 20 Q. -- to render your opinion in this case, correct? 21 A. That's correct. 22 Q. And so why did you do this subsequently? 23 A. Why? 24 Q. Yes.</p>	<p style="text-align: right;">Page 17</p> <p>1 Q. Okay. So to get back to the original question: 2 There's nothing in Exhibit 1 that draws any 3 conclusions that you've put in writing as part of 4 that exhibit, correct? 5 A. As part of this exhibit? 6 Q. Exhibit 1. Not Exhibit 3, Exhibit 1. 7 MR. FARRAH: The supplemental report. 8 A. I don't believe so. 9 Q. Okay. 10 (Pause.) 11 Q. Okay. On the back part of Exhibit 3 it has your 12 curriculum vitae, and I just want to go over that 13 briefly with you, if I could. 14 Can you tell me how far you've gone in 15 school? 16 A. High school, Watertown, '71 graduated. 17 Q. Have you had any formal education after Watertown 18 High School? 19 A. I went to UMass for a semester. 20 Q. And did you complete that semester? 21 A. I believe I did. 22 Q. Okay. Any formal education after that point? 23 A. No, sir. 24 Q. As far as personal background, are you married?</p>
<p style="text-align: right;">Page 15</p> <p>1 A. To prove to Al, plaintiff's counsel, that my point 2 was correct. 3 Q. Okay. Did you -- were you requested to do this? 4 A. I suggested it. I did it on my own first, and 5 then we spoke about it, and then he and I together 6 went to The Point and conducted it with 7 ExactoPour. 8 Q. When did you do that? 9 A. I think it was last week. 10 Q. Is there anything in your schedule that would have 11 physically prevented you from doing the exact same 12 thing that you did last week at The Point with 13 Attorney Farrah that you could not have done prior 14 to filing your original report with this court on 15 October 31st, 2006? 16 A. No. 17 Q. Okay. The supplemental report that you have 18 submitted, which has been marked as Exhibit 1, 19 does this in any way change your opinions in the 20 report that was submitted on October 31st, which 21 has been marked as Exhibit 3? 22 A. No, sir. 23 Q. It doesn't change your opinion in any way? 24 A. It confirms it.</p>	<p style="text-align: right;">Page 18</p> <p>1 A. Yes. 2 Q. Any children? 3 A. No, sir. 4 Q. What's your date of birth? 5 A. 3/4/53. 6 Q. Happy birthday. 7 A. Thank you. 8 MR. FARRAH: When is it? 9 THE WITNESS: 4th of March. 10 MR. GILLIS: Sunday. 11 THE WITNESS: I'm working a double. 12 Q. And is it fair to say that for -- without going 13 through your entire resume here, for approximately 14 the last 20 years you've been doing TIPS training 15 and testifying on service of alcohol? 16 A. Yes. 17 Q. Okay. If I look at your resume, your last job 18 prior to training was assistant manager of Tom 19 Foolery's from 1983 to 1985, correct? 20 A. Correct. 21 Q. Okay. When you were at Tom Foolery's, did you 22 bartend or were you just a manager? 23 A. I was assistant manager. 24 Q. Okay.</p>

<p style="text-align: right;">Page 19</p> <p>1 A. There'd be times I would bartend, of course. You 2 do everything when you're assistant manager. 3 Q. Okay. Were you TIPS certified when you were at 4 Tom Foolery's? 5 A. I was a trainer in October of '84. 6 Q. Okay. You left there in June of '85, correct? 7 A. Yes. 8 Q. So for a portion of that time you were TIPS 9 certified? 10 A. Yes. 11 Q. Okay. And prior to that you owned a restaurant as 12 well, correct? 13 A. I was partners in a restaurant, yes. 14 Q. Well, your title says owner, correct? 15 A. Yes. 16 Q. And at that restaurant you served alcohol, 17 correct? 18 A. Yes, sir. 19 Q. And you bartended, correct? 20 A. Yes, sir. 21 Q. Okay. Did you free pour? 22 A. Yes, sir. 23 Q. Okay. Do you have a problem with free pouring? 24 MR. FARRAH: Objection. Did he or does</p>	<p style="text-align: right;">Page 22</p> <p>1 two-for-ones? 2 A. Yes. 3 Q. Okay. Did you have an opinion that that was 4 inappropriate service of alcohol at that time? 5 MR. FARRAH: Objection. 6 A. Yes. 7 Q. Okay. So back when you were a bartender and it 8 was legal to serve two for one drinks, you felt 9 that was inappropriate service of alcohol? 10 MR. FARRAH: Objection. 11 A. I did believe that. 12 Q. Okay. What was inappropriate about it? 13 A. Well, if customer has half a drink in front of 14 them or a full drink in front of them, they tend 15 to drink that one quick, so the second one doesn't 16 warm up or die. So it tends to cause people to 17 drink a little bit faster. 18 Q. Well, that would be the same today if they served 19 them one drink when they had half a drink in front 20 of them, correct? 21 A. Yes, sir. 22 Q. Okay. So you think that any time someone has a 23 drink in front of them, if they get another drink 24 that's inappropriate service?</p>
<p style="text-align: right;">Page 20</p> <p>1 he? 2 Q. Yes. When you were a bartender, did you think it 3 was improper to free pour? 4 A. No, only -- no, I didn't at that point, because I 5 was trained to know what to look for and how to 6 pour. 7 Q. Okay. So as long as people know what to look for 8 and are properly trained, free pouring is an 9 appropriate way to serve a drink, would you agree? 10 MR. FARRAH: Objection. 11 A. If they're properly trained, I would say yes. 12 Q. Okay. Did you use the ExactoPour? 13 A. No. 14 Q. Did you need an ExactoPour? 15 A. No. 16 Q. Did you know about the ExactoPour? 17 A. I don't even think ExactoPour was in back then. 18 Q. Okay. Did you think it was improper service not 19 to use an ExactoPour when you were bartending? 20 MR. FARRAH: Objection. 21 A. No, I did not. 22 Q. Okay. And you were a bartender at T.G.I. Friday's 23 back in '77 to '81, correct? 24 A. Yes.</p>	<p style="text-align: right;">Page 23</p> <p>1 MR. FARRAH: Objection. 2 A. I would say you have to use your people skills. 3 If you're properly trained and you know that it's 4 safe to serve them another beer, that would be 5 fine, but it depends on the circumstances. 6 But generally, if a person has a half a 7 drink in front of them, you put up another one. 8 it's going to inspire them to drink faster. 9 Q. Okay. So is that inappropriate service or not? 10 A. In certain circumstances, yes. 11 Q. Okay. So it's not always inappropriate, correct? 12 MR. FARRAH: Objection. 13 A. It would depend on the circumstance, yes. 14 Q. Okay. It's a case-by-case analysis that the 15 person making the service of alcohol would have to 16 make, correct? 17 A. Certainly. 18 Q. Okay. And that would be based on their own 19 training, correct? 20 A. Correct. 21 Q. And it would be based on any indicators that they 22 see in the person to whom they're serving the 23 alcohol, correct? 24 A. Certainly.</p>
<p style="text-align: right;">Page 21</p> <p>1 Q. Okay. 2 A. I was -- not during that whole time. I had to go 3 through their training program. 4 Q. And when you were a bartender there, that was back 5 when Massachusetts allowed happy hours, correct? 6 A. Yes, sir. 7 Q. Okay. And you served people two-for-one drinks, 8 correct? 9 A. I don't remember that we had two-for-ones at 10 Friday's back then. 11 Q. If you were two-for-ones at Barbyann's? 12 A. No, sir. 13 Q. How about the Tom Foolery's? 14 A. I -- 15 MR. FARRAH: Did they have two-for-ones 16 there? 17 Q. Two-for-ones at Tom Foolery's? 18 A. I don't believe we did. I can't recall that we 19 ever did that there, no. 20 Q. Have you ever worked at a restaurant that served 21 two-for-ones? 22 A. I don't recall that, no. 23 Q. Okay. Have you ever -- were you aware, when you 24 were a bartender, that restaurants served</p>	<p style="text-align: right;">Page 24</p> <p>1 Q. And they'd review their inhibitions, correct? 2 A. Yes. 3 Q. Their coordination, correct? 4 A. Certainly. 5 Q. Any other things that -- judgment, correct? 6 A. Judgment and reactions. 7 Q. Reaction. They look at all those things, and it 8 would be a judgment that they would have to make, 9 because they're the ones who are there serving the 10 drink, correct? 11 MR. FARRAH: Are you testifying or is he? 12 Objection. 13 MR. GILLIS: I'm going to strike the 14 comment. 15 Q. But go ahead and answer. 16 MR. FARRAH: You can't strike the comment 17 from the record. 18 A. Shall I continue? 19 Q. Yes. 20 MR. FARRAH: I object. 21 A. Would you rephrase the question again for me, 22 because I've lost my train of thought. I'm sorry. 23 Q. There are circumstances when serving someone who 24 has a half a drink in front of them is not</p>

<p style="text-align: right;">Page 25</p> <p>1 inappropriate, correct?</p> <p>2 A. I don't think it's wise, but it -- there'd be</p> <p>3 certain circumstances where I would -- I might do</p> <p>4 that.</p> <p>5 I have to be very cognizant of what the</p> <p>6 strength of the drink is that I'm serving them,</p> <p>7 and the speed in which they're drinking.</p> <p>8 I would also have to be aware of whether</p> <p>9 they're eating or not.</p> <p>10 Again, we talked about inhibitions,</p> <p>11 judgment, reactions and coordination. I would</p> <p>12 also be concerned about the intoxication rate</p> <p>13 factors, and the stress, exhaustion and mood an</p> <p>14 individual might be under at the time.</p> <p>15 Q. Okay. So let's get off the fence. Either it's</p> <p>16 appropriate or it's inappropriate to serve someone</p> <p>17 with a half a drink in front of them. Which is</p> <p>18 it?</p> <p>19 MR. FARRAH: Objection to the form. He's</p> <p>20 answered the question.</p> <p>21 A. I would basically say that I have answered the</p> <p>22 question. It's a judgment call based on the</p> <p>23 individual circumstances, but I don't recommend</p> <p>24 it.</p>	<p style="text-align: right;">Page 28</p> <p>1 A. You could -- I don't -- didn't even really thought</p> <p>2 about it.</p> <p>3 Q. But it's perfectly legal in Massachusetts to give</p> <p>4 one person two drinks to take away and do with</p> <p>5 what they wish, correct, other than give it to a</p> <p>6 minor or intoxicated person?</p> <p>7 MR. FARRAH: Objection to the form.</p> <p>8 A. I can't answer that question yes or no. Every</p> <p>9 time somebody orders two drinks from me, if I'm a</p> <p>10 bartender or I train people, if they order two</p> <p>11 drinks, you ask where's the other one going? And</p> <p>12 if they say they're both for him, then I say,</p> <p>13 listen, I'm going to be here all night long, I'll</p> <p>14 give them to you one at a time.</p> <p>15 Q. So you disagree with the current Massachusetts law</p> <p>16 that allows a person to get two drinks at one</p> <p>17 time?</p> <p>18 A. No, I didn't say that. I disagree if it's for</p> <p>19 their own consumption.</p> <p>20 Q. Okay. If a person buys two drinks for their own</p> <p>21 consumption, is that legal in Massachusetts?</p> <p>22 A. In certain cities it is, yes.</p> <p>23 Q. What cities is it not legal in?</p> <p>24 A. Worcester. Quincy recommends, but doesn't</p>
<p style="text-align: right;">Page 26</p> <p>1 Q. Okay. Did you ever serve anybody a drink with a</p> <p>2 half a drink in front of them when you were a</p> <p>3 bartender?</p> <p>4 A. I honestly can't remember that far back.</p> <p>5 Q. Okay.</p> <p>6 A. It's been a while since I've been behind the</p> <p>7 stick.</p> <p>8 Q. You currently train quite regularly people in the</p> <p>9 TIPS program, correct?</p> <p>10 A. Yes, I do.</p> <p>11 Q. And do you instruct them specifically never to</p> <p>12 give a drink to anyone who has a portion of a</p> <p>13 drink in front of them; never get them another</p> <p>14 drink?</p> <p>15 A. Yes, I do.</p> <p>16 Q. You state that in every seminar that you give?</p> <p>17 A. Yes. The standard line I give them is if you have</p> <p>18 half a drink in front of you, and I put up another</p> <p>19 one, what would you do with the one in front of</p> <p>20 you? And inevitably, more than 99 percent of the</p> <p>21 time they say I would finish it faster.</p> <p>22 Q. Okay.</p> <p>23 A. Once in a while somebody will say I'll give it</p> <p>24 back to you and take the new one.</p>	<p style="text-align: right;">Page 29</p> <p>1 regulate.</p> <p>2 Q. Okay.</p> <p>3 A. So it's important to know what the city or town</p> <p>4 requires.</p> <p>5 Q. Other than Worcester, in what city or town in</p> <p>6 Massachusetts is it illegal by town ordinance to</p> <p>7 give someone two drinks?</p> <p>8 A. I really haven't bothered to look at all the</p> <p>9 cities' and towns' rules and regulations on that</p> <p>10 specific item, but it is contrary to responsible</p> <p>11 beverage service.</p> <p>12 Q. Okay. So you disagree with the Massachusetts law</p> <p>13 that allows someone to serve one person two</p> <p>14 drinks, even if it's for their own consumption?</p> <p>15 A. No. If it's for some -- if they're buying it for</p> <p>16 somebody else, I don't disagree with it, as long</p> <p>17 as I know where the drink is going.</p> <p>18 If it's for their own consumption, I</p> <p>19 would say one drink per person at a time would be</p> <p>20 wise.</p> <p>21 Q. And that was my question. Do you disagree with</p> <p>22 the Massachusetts law that allows a person to get</p> <p>23 two drinks for their own consumption, correct?</p> <p>24 A. The law doesn't say that. The regulation says you</p>
<p style="text-align: right;">Page 27</p> <p>1 Q. As apart of the TIPS program, you give them, the</p> <p>2 people, written materials as well, correct?</p> <p>3 A. Yes, sir.</p> <p>4 Q. And you do video training as well, correct?</p> <p>5 A. Yes, sir.</p> <p>6 Q. Nothing in the written materials says don't serve</p> <p>7 someone who has a portion of a drink left in front</p> <p>8 of them, correct?</p> <p>9 A. It actually says do not serve a fresh drink</p> <p>10 without taking away the glass from the last drink.</p> <p>11 Q. Okay. Massachusetts allows people to get served</p> <p>12 two drinks simultaneously, correct?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. The state law says you cannot deliver to one</p> <p>15 person any more than two drinks at a time.</p> <p>16 There are cities and towns that recommend</p> <p>17 only one drink per person at a time.</p> <p>18 Q. What does Leominster recommend?</p> <p>19 A. I haven't looked at the Leominster regulations.</p> <p>20 Q. Did you think that was important in this case?</p> <p>21 A. It would be wise, true.</p> <p>22 Q. So why didn't you do it?</p> <p>23 A. I just never got around to doing it.</p> <p>24 Q. Didn't have time?</p>	<p style="text-align: right;">Page 30</p> <p>1 cannot deliver to one person any more than two</p> <p>2 drinks at a time. That's all it says.</p> <p>3 When it was originally written back in</p> <p>4 the early '80s, when McCarthy was at the ABCC, it</p> <p>5 was one drink per person at a time. But through</p> <p>6 the lobby efforts of the MRA, they loosened it up</p> <p>7 to read two, because of the argument I'd like to</p> <p>8 get my wife a glass of wine while we're waiting</p> <p>9 for dinner.</p> <p>10 That's how long I've been in this</p> <p>11 business.</p> <p>12 Q. Or people want to get two drinks at a sporting</p> <p>13 event because of the length of the line?</p> <p>14 A. Again, if it's both for them, they tend to drink</p> <p>15 them faster, so that's a problem.</p> <p>16 Q. Okay. So every guy who goes up to get two beers</p> <p>17 at Fenway Park, you disagree with that service of</p> <p>18 alcohol, correct, if those two drinks are for</p> <p>19 their own consumption?</p> <p>20 A. If it was for their own consumption, yes, I do.</p> <p>21 Q. Okay. And you agree with -- you disagree with</p> <p>22 that same premise at TD Banknorth Garden, correct?</p> <p>23 A. TD Banknorth Garden leaves it up to the discretion</p> <p>24 of the individual server.</p>

<p style="text-align: right;">Page 31</p> <p>1 If you feel that this person's drinking 2 too fast, and you assume those two beers are for 3 them, then you can go to one beer at a time. 4 Q. That wasn't the question. Do you disagree with TD 5 Banknorth serving two beers to one person for 6 their own consumption? 7 A. I don't agree with that. 8 Q. Okay. Do you agree with Foxboro Stadium which 9 serves -- serving two beers to one patron for 10 their own consumption? 11 A. I do not agree with that. 12 Q. Do you agree with the Worcester 13 Centrum -- disagree with the Worcester Centrum 14 serving two beers to one person for their own 15 consumption at a sporting event? 16 A. Whatever venue you say, I'm going to say the same 17 answer. No, I do not agree with that. 18 Q. No matter where in Massachusetts, even if it's 19 legal, they serve two beers or two alcoholic 20 drinks to one person for their own consumption, 21 you disagree with that? 22 A. Yes. 23 Q. Okay. Are you aware of the Team Program in New 24 Hampshire?</p>	<p style="text-align: right;">Page 34</p> <p>1 might be the chairman of the New Hampshire 2 Commission at this point in time. 3 Q. And you felt that the service -- that the training 4 he gave you was inadequate? 5 A. No. Randall Avery did a good job back in -- this 6 is back in the early, early '80s. In fact, I 7 called him and complained about the people who 8 trained me when I took the program. 9 Q. Other than Mr. Avery and the person who trained 10 you, have you sat through any other training for 11 the Team Program in New Hampshire? 12 A. No. 13 Q. Okay. So you're not personally aware of how any 14 other trainers do the program, because -- 15 A. Not in that -- 16 Q. -- you haven't been there, correct? 17 A. That's correct. 18 Q. You were on the Governor's Highway Safety Bureau 19 from 1984 to '85, correct? 20 A. Yes. 21 Q. Well, according to your resume here. 22 A. Yes. 23 Q. What you did do in that one year on the Highway 24 Safety Bureau?</p>
<p style="text-align: right;">Page 32</p> <p>1 A. Yes. 2 Q. Can you tell me about the Team Program? 3 MR. FARRAH: Objection to the form. 4 A. Team Program is more -- 5 MR. GILLIS: What was wrong with the form 6 of that question? 7 MR. FARRAH: What do you want him to tell 8 you about it? We'll be here a long time. 9 MR. GILLIS: Well, fine. We're not in a 10 rush. 11 A. The Team Program is a program that the liquor 12 commission puts on that covers laws and IDs, and 13 touches upon briefly pharmacological effects. 14 Q. Do you think that's an adequate program? 15 MR. FARRAH: Objection. 16 A. It depends who's training it. 17 Q. Well, when did you come up with that? Haven't you 18 previously testified that you said that that 19 program is inadequate? 20 MR. FARRAH: Objection. 21 A. Yes, I did. 22 Q. And said that more than 50 percent of the 23 bartenders in New Hampshire who have taken that 24 state program are not properly trained? Isn't</p>	<p style="text-align: right;">Page 35</p> <p>1 A. It was a -- 2 MR. FARRAH: Objection to the form. 3 A. It was a voluntary committee I was on to research 4 programs that were in the United States to teach 5 people how to sell and serve alcohol responsibly. 6 Q. How much time did you spend during that time 7 period working on that project? 8 A. I can't tell you specifically. It was well over 9 20 years ago. 10 Q. Okay. Was it -- 11 A. It was significant. I spent a -- I did a lot of 12 research. 13 Q. Did you have a full-time job at the time? 14 A. Yes, sir. I was at Tom Foolery's, I believe. 15 Q. Okay. So whatever time you spent was in your 16 spare time when you weren't working full-time? 17 A. Correct. 18 Q. So it wasn't a full-time job for you to look up 19 these programs, correct? 20 A. No. 21 Q. And the program you got was out of Washington 22 D.C., the TIPS program, correct? 23 A. I chose -- 24 MR. FARRAH: I'm sorry. Was the question</p>
<p style="text-align: right;">Page 33</p> <p>1 that your testimony? 2 A. Yes, it was. 3 Q. So it wasn't -- 4 A. It wasn't testimony actually. It might have been 5 testimony, but it was -- I wrote it in a chapter 6 in a book, I'm sure. 7 Q. You quoted it from your deposition, correct? 8 A. Yes. 9 Q. Are you now saying that that was inaccurate? 10 A. No. I still believe it. I wouldn't let them 11 train my dog. 12 Q. Okay. So in addition to it being inappropriate 13 service at all these venues across Massachusetts, 14 you think that the New Hampshire state program for 15 training their bartenders is insufficient, 16 correct? 17 A. If the people who are training the people that 18 trained me, yes. 19 Q. Okay. Are you aware of any other trainers, other 20 than who trained you? 21 A. Not in New Hampshire, no. I was disappointed -- 22 Q. Okay. You -- 23 A. I had been trained by a guy by the name of Randall 24 Avery in the past who was the chairman -- who</p>	<p style="text-align: right;">Page 36</p> <p>1 the program you got? 2 Q. The program that you found and settled on through 3 your research was the TIPS program, which was 4 based out of Washington D.C., correct? 5 MR. FARRAH: Objection to the form. 6 A. Yes. 7 Q. Okay. And you suggested it to the state, correct? 8 A. I don't know if I -- I don't know if I can say 9 that I suggested it to the state, but I -- out of 10 all the research that I did, I thought it was the 11 most credible program at the time. 12 Q. Well, you say on your website that you found the 13 program and brought it to Massachusetts. Is that 14 accurate? 15 A. Probably. I found it when I did my research. I 16 chose it, and I've been teaching it every since. 17 I've trained over 40,000 people in the program. 18 Q. Okay. But you've had no affiliation with that 19 organization for the past 22 years, correct? 20 A. The Governor's Highway Safety Bureau? 21 Q. Yes. 22 A. Off and on I have. 23 Q. Well, why is it not included in your resume? 24 A. Because I don't care about my resume. I'm a TIPS</p>

<p style="text-align: right;">Page 37</p> <p>1 trainer. That's what I do.</p> <p>2 Q. Okay.</p> <p>3 A. The resume is not -- it's just a guideline. It</p> <p>4 doesn't matter to me. What matters to me is --</p> <p>5 Q. It does matter to people who are trying to depose</p> <p>6 you to find out what your experience is.</p> <p>7 A. Well --</p> <p>8 Q. Are you aware -- can you tell me exactly what</p> <p>9 experience you have with the Governor's Highway</p> <p>10 Safety Bureau since 1985 that's not included in</p> <p>11 your curriculum vitae?</p> <p>12 A. I had a list of educational -- additional</p> <p>13 educational experiences, and I had a list -- I</p> <p>14 don't have it with me -- that talked about the</p> <p>15 variety of different alcohol awareness seminars</p> <p>16 that I participated in with the Governor's Highway</p> <p>17 Safety Bureau. And that occurred throughout the</p> <p>18 '80s, into the '90s.</p> <p>19 Q. And where is that?</p> <p>20 A. In my office.</p> <p>21 Q. Did you provide it to counsel as part of your CV?</p> <p>22 A. I don't recall. I might have. I really don't</p> <p>23 recall.</p> <p>24 Q. Will you provide him a copy to give to us?</p>	<p style="text-align: right;">Page 40</p> <p>1 THE WITNESS: I'm sorry.</p> <p>2 MR. FARRAH: No, it's all right.</p> <p>3 Q. Just to speed things along, he can object to the</p> <p>4 form of the question. It doesn't stop you from</p> <p>5 answering it. So when he objects, you can go</p> <p>6 ahead and answer anyways.</p> <p>7 A. Very well.</p> <p>8 Q. And if he doesn't want you to answer, he'll tell</p> <p>9 you not to.</p> <p>10 A. Very good. Who told me that --</p> <p>11 Q. That was the reason why you were no longer on the</p> <p>12 advisory committee?</p> <p>13 A. I believe Tom McCane did.</p> <p>14 Q. And where is Tom McCane?</p> <p>15 A. I don't know where he is now. He was the owner of</p> <p>16 Tom Foolery's.</p> <p>17 He was a past president of the Mass</p> <p>18 Restaurant Association, and he encouraged me not</p> <p>19 to teach -- not to testify against any</p> <p>20 establishment.</p> <p>21 Q. So your former boss is the one that you believe</p> <p>22 precluded you from being involved with the Alcohol</p> <p>23 Awareness Advisory Committee for the Mass</p> <p>24 Restaurant Association?</p>
<p style="text-align: right;">Page 38</p> <p>1 A. Absolutely.</p> <p>2 Q. You spent six years on the Alcohol Awareness</p> <p>3 Advisory Committee, correct?</p> <p>4 A. Yes, that's the -- that was the -- that was a</p> <p>5 subsection of the Governor's Highway</p> <p>6 Safety -- that's what they called the committee.</p> <p>7 Q. Okay. What did you do on that committee?</p> <p>8 A. Basically conducted a portion in an all-day</p> <p>9 seminar that they had conducted at the different</p> <p>10 counties in Massachusetts; and also attended some</p> <p>11 of the other seminars that they -- the Governor's</p> <p>12 Highway Safety Bureau would put seminars together</p> <p>13 in different counties, and a variety of different</p> <p>14 speakers would speak.</p> <p>15 Q. Were you paid for those speaking engagements?</p> <p>16 A. I was given -- not initially. And then later on I</p> <p>17 was given a stipend.</p> <p>18 Q. During that six-year period how many seminars</p> <p>19 would you approximate that you gave?</p> <p>20 A. I really don't know. I'd have to look at the</p> <p>21 paper that I have.</p> <p>22 Q. You have that all written down someplace?</p> <p>23 A. Pretty much.</p> <p>24 Q. And that's in the documents that you will give to</p>	<p style="text-align: right;">Page 41</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. One of a few, yes.</p> <p>3 Q. By the way, during that time period, '88 to '93,</p> <p>4 you testified against restaurants, is that</p> <p>5 correct?</p> <p>6 A. I had.</p> <p>7 Q. Okay.</p> <p>8 A. I think in '87 was one of the first cases I worked</p> <p>9 on.</p> <p>10 Q. And you've been testifying since, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. What percentage of your testifying is for</p> <p>13 plaintiffs, as opposed to defendant restaurants in</p> <p>14 the cases that you're involved in?</p> <p>15 MR. FARRAH: In Dram Shoppe type cases,</p> <p>16 is that what you're --</p> <p>17 MR. GILLIS: Yes, Dram Shoppe type cases.</p> <p>18 A. Primarily all. There's been a couple that I've</p> <p>19 worked for the defense.</p> <p>20 Q. How much money do you make a year as an expert?</p> <p>21 A. I don't know what the dollar value is, but I -- in</p> <p>22 a recent deposition I was asked to do a percentage</p> <p>23 of income, and I can tell you the -- at the most I</p> <p>24 think one year was 12 percent. It could be as</p>
<p style="text-align: right;">Page 39</p> <p>1 your lawyer?</p> <p>2 A. Absolutely.</p> <p>3 Q. What was your affiliation, if any, with the Mass</p> <p>4 Restaurant Association from 1988 to 1993?</p> <p>5 A. I was part of their alcohol awareness committee</p> <p>6 to -- that dealt basically with alcohol issues.</p> <p>7 Q. How much time did that require?</p> <p>8 A. It depended on what I was doing. I helped to -- I</p> <p>9 pretty much put together a program called Project</p> <p>10 Stop, which taught people how to recognize and</p> <p>11 properly check IDs; recognize fake IDs. And that</p> <p>12 took some time.</p> <p>13 Q. Is there a reason why you haven't had any</p> <p>14 affiliation with them since 1993?</p> <p>15 A. Yes.</p> <p>16 Q. What?</p> <p>17 A. I had testified against bars and restaurants as an</p> <p>18 expert witness, and they frowned upon that. And</p> <p>19 then they basically didn't want me to be part of</p> <p>20 that group anymore.</p> <p>21 Q. Who told you that was the reason you were asked to</p> <p>22 leave?</p> <p>23 A. I wasn't asked --</p> <p>24 MR. FARRAH: Objection to the form.</p>	<p style="text-align: right;">Page 42</p> <p>1 little as one percent.</p> <p>2 My primary income source is responsible</p> <p>3 alcohol server training.</p> <p>4 Q. When you say 12 percent, let's take 2006. What</p> <p>5 amount of money did you make as an expert in 2006?</p> <p>6 A. I have no idea right off the top of my head.</p> <p>7 Q. Do you have a ballpark?</p> <p>8 MR. FARRAH: Objection to the form.</p> <p>9 A. I really can't tell you. Do you want me to guess?</p> <p>10 Q. No. You know how to work a deposition. You've</p> <p>11 been deposed before.</p> <p>12 A. I do.</p> <p>13 Q. And you know nobody wants guesses. I'm just</p> <p>14 asking you to state under oath whether or not you</p> <p>15 can tell me what income you derived, with</p> <p>16 approximation, not guessing, for the calendar year</p> <p>17 2006.</p> <p>18 A. I would say under 20,000. I would say more</p> <p>19 than -- maybe more than 10. Somewhere around</p> <p>20 there.</p> <p>21 Q. And how much money in 2006 did you earn as a</p> <p>22 server trainer?</p> <p>23 A. I know the gross income for my company was</p> <p>24 260-some-odd thousand dollars, I think. Or in</p>

<p style="text-align: right;">Page 49</p> <p>1 specific records, so I didn't bring anything with 2 me. I apologize if that's what I'm supposed to 3 do. I am not -- 4 MR. FARRAH: That's not what he's asking 5 you. 6 THE WITNESS: I'm sorry. 7 Q. Well, did you talk to your lawyer -- strike that. 8 You filed a Rule 26 disclosure in this 9 case, correct, which is Exhibit 3? 10 MR. FARRAH: The report. 11 A. Yes, the report I filed. 12 Q. Okay. Did you review Rule 26 to see what was 13 required of you of prior testimony? 14 A. I did not. 15 Q. Okay. When the deposition's over will you review 16 it with counsel and provide us all of the cases 17 that that Rule requires? 18 A. Yes, I will. 19 MR. FARRAH: But just for the record, 20 less the record be unclear, you first asked 21 him -- you first asked him whether he had 22 testified in Massachusetts in the last five years, 23 I think under the misapprehension that Rule 26 24 required that witnesses go back five and not four</p>	<p style="text-align: right;">Page 52</p> <p>1 of any other testimony while we're sitting here 2 that you've testified in Massachusetts, or for 3 that matter anywhere else, in the last four years 4 that's not included in here? 5 MR. FARRAH: Exhibit 3, your report. 6 A. I really -- I'd have to look at my files to see 7 that, sir. 8 Q. Okay. 9 THE WITNESS: Can I take a quick one? 10 MR. GILLIS: Sure. Five-minute break? 11 THE WITNESS: Yes. 12 (Short break was taken.) 13 Q. Okay. During the break you've provided me with 14 two additional documents? 15 The first is -- says Dram Shoppe 16 Consultants at the top, and it says related 17 educational experience. 18 Do you recognize that document? 19 A. Yes. 20 Q. And can you tell me what that document is? 21 A. It was a list of the seminars that I attended, and 22 things that related to responsible alcohol service 23 in the years -- and it has the Governor's Highway 24 Safety Bureau seminars on it, to the best of my</p>
<p style="text-align: right;">Page 50</p> <p>1 years. 2 And his report, which has been marked as 3 Exhibit 3, on the page that begins with the 4 discussion of prior testimony, starts with the 5 following are court appearances or court cases 6 that I've given depositions within the last four 7 years. 8 If there's more, we'll certainly get it 9 for you, but I don't want the record to be 10 left -- 11 MR. GILLIS: I agree with what you said, 12 and I believe I asked the question the second way. 13 But just in case I didn't, let me do it 14 appropriately. 15 Q. Are you aware of any other testimony, either by 16 deposition or at trial, that you've given in any 17 case in the last four years which is not included 18 in this list which is part of Exhibit 3? 19 MR. FARRAH: That's four years back from 20 October 31, 2006. So October 31, 2006. 21 A. I would have to look at my records to answer that 22 properly. 23 MR. FARRAH: We will, and if there's 24 more, we'll get it for you. And if you want to</p>	<p style="text-align: right;">Page 53</p> <p>1 knowledge, as you requested. 2 Q. Okay. Let's get that marked. 3 (Exhibit No. 4, educational experience, 4 marked for identification.) 5 Q. Now, have you -- other than your TIPS training, 6 which you do -- you do that fairly regularly, 7 correct? 8 A. Yes. 9 Q. Other than your TIPS training, are there any other 10 seminars that you have done since this -- since 11 this list, which you can take a look at it, but it 12 looks to me like the last date on here is 2002, 13 with the Lobster Boat Restaurant in Yarmouth. 14 MR. FARRAH: Seminars to taken or given? 15 MR. GILLIS: Given. 16 A. I do seminars in Yarmouth every year for the 17 Yarmouth Restaurant Association. It's more of an 18 awareness seminar, kind of an overview. I do 19 awareness seminars, like for Smith College. 20 The awareness seminar covers laws, IDs, 21 how to recognize intoxication and intervention 22 strategies, but I don't list them when I do them. 23 Q. Okay. Why is that? 24 MR. FARRAH: Why doesn't he list them?</p>
<p style="text-align: right;">Page 51</p> <p>1 bring him back to ask about that, I don't have a 2 problem with that. 3 Q. Without pinning you down exactly, do you have any 4 memory of testifying in Massachusetts within the 5 last four years for any reason? That'd be 19 -- 6 A. In civil or criminal? 7 Q. Either. 2002 to 2006? 8 A. I did testify in a criminal case in September, I 9 think it was, of this past year. 10 Q. Okay. Where was that? 11 A. That was at Middlesex Superior Court. 12 Q. And what was the nature of the case? 13 A. I was inline blading, skating in a cemetery down 14 the street from my house, and I saw a gentleman 15 who was staggering to a motorcycle. I -- and this 16 was in April. I called the police, and they 17 subpoenaed me to testify as to what I saw, because 18 they did catch him. 19 Q. So that was as a fact witness, not as an expert, 20 correct? 21 A. Correct. 22 Q. Do you know of any other testimony, off the top of 23 your head? And again, I know you're going to go 24 check your records and so forth, but can you think</p>	<p style="text-align: right;">Page 54</p> <p>1 MR. GILLIS: Yes. 2 A. I don't think it's necessary. 3 Q. Does it deal with the service of alcohol by 4 servers? 5 A. It would be, or it could be a social host setting, 6 sure. 7 Q. You don't think that's relevant to your disclosure 8 as to seminars? 9 A. Well, I mean, it may very well be relevant in this 10 circumstance, but I didn't think it was necessary. 11 And do I have to provide every single 12 TIPS class I -- because I probably do 150 to 200 13 TIPS classes a year, so I'm confused. 14 Q. I already accepted -- I asked the question except 15 for your TIPS classes. 16 A. Sorry. 17 Q. Other than Smith College and Yarmouth, are you 18 aware of any other organizations that you do 19 training for that's not listed on here, other than 20 your TIPS training -- 21 MR. FARRAH: Exhibit 4. 22 Q. -- concerning alcohol service and awareness? 23 A. I -- nothing comes to the top of my head right 24 now.</p>

<p style="text-align: right;">Page 55</p> <p>1 Q. Okay. 2 (Pause.) 3 A. Oh, I'm sorry, I have done -- I did an awareness 4 seminar for 600 freshman, for the freshman class 5 of Williams College in the past two years. 6 Q. How does that awareness program differ from TIPS 7 training? 8 A. It basically focuses on the liabilities, and how 9 they can make a difference as a friend 10 being -- when you're watching your friends consume 11 or overconsume alcohol. 12 Q. Okay. 13 A. And basically touches upon the liability. I kind 14 of designed it around the audience, if you will. 15 Q. Okay. And you've provided me with another 16 document, which I'll ask you to identify. 17 A. It's the more recent -- after '02, the more 18 recent -- I did a deposition -- I participated in 19 a deposition on January 25th, '07 on a case in 20 Georgia. 21 And that's I think the only additional 22 information that we have on that, compared to what 23 you had before. 24 Q. As part of the disclosure pursuant -- in</p>	<p style="text-align: right;">Page 58</p> <p>1 somebody else, but I'm the one that types it, yes. 2 Q. Okay. Paragraph 2 goes over what you pretty much 3 talked about already, about your service and 4 training? 5 A. Yes. 6 Q. And in Paragraph F, sub -- 7 MR. FARRAH: 2F. 8 Q. You talk about your peer reviewed studies and 9 articles that you serve as a scientific basis for 10 the TIPS and which address the issues listed, 11 Subparagraph 2F, 1 through 5, correct? 12 A. Yes. 13 Q. What articles are you referring to? 14 A. Oh, gosh. They would be articles that the NHTSA, 15 National Highway Safety Bureau, would have 16 provided over the years. 17 They would be articles of the National 18 Alcohol and Alcohol Abuse Council, I think, 19 Dr. Chafetz's writings from TIPS. And mostly 20 Dr. Chafetz's writing. 21 Q. How do you spell Chafetz? 22 A. C-H-A-F-E-T-Z. 23 Q. F-E-T-Z? 24 A. Yes.</p>
<p style="text-align: right;">Page 56</p> <p>1 Exhibit 3, correct, that's the only other case 2 that's been added is the '07? 3 A. Yes, that's the only other deposition I've been 4 involved in, I believe. I haven't even read 5 the -- like I said, I haven't reviewed it yet. 6 Q. And what were you requested to testify to in that 7 case? 8 A. The responsible service of Ruby Tuesday's. 9 Q. Okay. And what was the facts scenario in that? 10 A. The facts and the scenario in that is people were 11 served a large amount of alcohol, and then 12 collided with an ATV with six children on it. And 13 I think five of the children were killed, and one 14 was seriously injured. 15 Q. When you say a large amount of alcohol, how much 16 alcohol was the driver served? 17 A. I don't know exactly. I can't tell you exactly at 18 this point in time. It was -- I don't know the 19 exact specifics. I think it was shots. I think 20 there was some beers involved, but I can't 21 remember specifics of it right at this point in 22 time. 23 Q. Okay. We'll get this marked as an exhibit. 24 (Exhibit No. 5, updated testimony, marked</p>	<p style="text-align: right;">Page 59</p> <p>1 Q. And where is he located? 2 A. I think he's -- his son, Adam Chafetz, runs Health 3 Communications, which is in Arlington, Virginia. 4 And he might be in Arlington, Virginia, or he 5 could still be in Washington, D.C. They're real 6 close to each other. 7 Q. And that's the company that runs the TIPS program, 8 correct? 9 A. Yes, sir. 10 Q. And in addition to training like you do, they 11 actually have an online training program as well, 12 correct? 13 A. They have developed an online training program. 14 Q. And where did you find Dr. Chafetz, his writings, 15 that you relied upon? 16 MR. FARRAH: Where did he find them? 17 MR. GILLIS: Yes. 18 MR. FARRAH: Is that what you asked? 19 A. I don't know. I don't have the book in front of 20 me. I really don't know. 21 I'm sure I've read a bunch of his stuff 22 over the years, because we're talking 23 years of 23 contact with that group, just about. 24 Q. As you sit here today, can you remember any of</p>
<p style="text-align: right;">Page 57</p> <p>1 for identification.) 2 Q. You have in front of you Exhibit 3, correct? 3 A. Yes. 4 Q. And that's your Rule 26 disclosure, is what we've 5 been calling it, in this case, correct? 6 A. Yes. 7 Q. Based on -- 8 (Pause.) 9 Q. You list in there, under I believe Section G -- 10 MR. FARRAH: What page? 11 MR. GILLIS: Second page. 12 MR. FARRAH: Okay. 13 Q. You start out with the first page, Paragraph 1, 14 Paragraph 2, and then a bunch of alphabetical 15 paragraphs, correct? 16 A. The one that says I have developed and lectured? 17 Q. Well, let's start at the beginning. Paragraph A, 18 it says that you conclude these conclusions to a 19 reasonable degree of responsible alcohol beverage 20 service certainty, is that correct? 21 MR. FARRAH: That's Paragraph I. 22 MR. GILLIS: Yes. 23 Q. And it's beverage, correct? 24 A. I am not a good speller. I'd like to blame it on</p>	<p style="text-align: right;">Page 60</p> <p>1 those articles that dealt specifically with 2 determining the amount of volume in a glass of 3 alcohol, similar to what you've done in Exhibits 1 4 and 2? 5 A. Not specifically, no. 6 Q. Okay. Have you ever been retained as an expert to 7 testify as to the volume of liquid in a particular 8 glass, whether it be alcohol or not alcohol? 9 A. I don't believe so, no. 10 Q. Okay. Do you have an expertise in that area? 11 A. Not other than common sense, no. 12 Q. Okay. You've never taken any training in that 13 area, correct? 14 A. No, sir. 15 Q. Okay. And while you've done this, Exhibit 1 and 16 Exhibit 2, this is done not in your field of 17 expertise, but just something you physically are 18 able to do, correct? 19 A. Certainly. 20 Q. Okay. These five categories that you address, 21 these are the categories that you routinely 22 address in the TIPS program, correct? 23 A. Yes. 24 Q. In the TIPS program, and in these five paragraphs,</p>

<p style="text-align: right;">Page 61</p> <p>1 none of them deal with measuring the amount of 2 liquid in a glass, correct? 3 A. Well, the effects of alcohol consumption on 4 individuals would also -- would always include 5 that. 6 For example, the TIPS programs teaches 7 that one ounce of 100 proof spirits is equal to 8 five ounces of wine, is equal to 12 ounces of 9 beer. 10 All three of those measurements roughly 11 have a half an ounce of pure ethyl alcohol. And 12 four of those drinks in an hour for 150-pound man 13 on an empty stomach could bring that man's BAC to 14 a .10. 15 Q. Agreed. I agree with all that. But my question 16 was: Do these topics deal not with the amount of 17 pure alcohol, but how to measure the amount of 18 volume in a drink, based on the glass, like you've 19 done here on Exhibits 1 and 2? 20 A. Well, it's part of the training. I mean, if you 21 don't know how much wine you pour in a wine glass, 22 if you don't know how much beer you pour in a beer 23 glass. 24 So I would say to a degree it does have</p>	<p style="text-align: right;">Page 64</p> <p>1 To do that, how much booze would have to 2 be poured over ice to get that water melted to 3 lift to that level? That's a standard question I 4 ask in every class. 5 When they have 25 ounce beers, if they 6 have a 16 ounce draft beer, for example, because a 7 lot of people are serving beers in 16 ounce 8 glasses, three of those is equal to four beers 9 pharmacologically. 10 Servers need to know that, because 11 alcohol's a drug, it should be dispensed in a 12 measured dose, because a stiff drink will cause a 13 customer to lose track. And those are very 14 important issues that have to be covered in 15 responsible server training. 16 Q. Okay. Have you now told me everything 17 that -- dealing specifically with volume in a 18 glass that you teach in your TIPS program? 19 MR. FARRAH: Objection. 20 A. I don't know if it's everything, but it's a 21 significant amount. 22 Q. Okay. As you sit here right now, you can't think 23 of anything else that you routinely teach in the 24 TIPS program as concerns volume in a glass,</p>
<p style="text-align: right;">Page 62</p> <p>1 something to do with that. 2 Q. Where specifically in the TIPS training programs 3 that you run, or in the literature, does it say if 4 you have a six ounce glass that's filled to a 5 quarter inch from the top, it equals X amount of 6 volume of liquid? 7 A. I don't know that it actually has that, per se, 8 but Bar Code will tell you that a martini is 9 considered two drinks, at least. 10 Q. Okay. I'm not getting into the alcohol. I'm 11 getting into the volume, the number of ounces of a 12 drink, regardless of their strength. 13 Do you teach, by looking at a glass, like 14 in these photographs, people how to determine from 15 looking at the glass how much liquid is in the 16 glass, whether it's alcohol or not alcohol? 17 A. Do I teach that? 18 Q. Yes. 19 A. Yes. 20 Q. Okay. How do you teach that? What specifically? 21 A. If I go into a bar or restaurant -- if I was going 22 into The Gillis, for example, and I was to train 23 your staff, I would do a measurement of the amount 24 of liquid that would be in a particular cocktail</p>	<p style="text-align: right;">Page 65</p> <p>1 correct? 2 A. Not off the top of my head, no. 3 Q. Okay. 4 A. It would all depend on the particular 5 establishment, correct. 6 Q. It's a case-by-case analysis, correct? 7 A. Not -- there's no state law that says you can't 8 pour a ten ounce martini, so it be would be a 9 case-by-case issue. 10 Q. You said that the standard -- in a five ounce 11 glass, if I put an ounce and a quarter of vodka 12 and I fill it up with ice, that'll bring it to the 13 top, is that correct? 14 A. About a quarter of an inch from the top of a rocks 15 glass. 16 Q. And that's vodka on the rocks, correct? 17 A. If you're using a five ounce rocks glass, you pack 18 that with ice, it usually comes to about a quarter 19 of an inch from the top. 20 Q. Okay. How about in a straight up martini? 21 MR. FARRAH: Objection to -- is that the 22 question, how about a straight up martini? 23 Objection. 24 Q. How about a straight up martini, how high would</p>
<p style="text-align: right;">Page 63</p> <p>1 that you would be serving. In other words, 2 perceived value. 3 If you had a five ounce rocks 4 glass -- generally, when a glass is given to a 5 guest, they expect it to be at least full or a 6 quarter of an inch from the top. 7 To do that with a five ounce rocks glass, 8 you'd have to pack that with ice, and you'd pour 9 an ounce and a half of vodka in there, and it 10 would fill to that level. 11 So those are the kinds of things that I 12 need to know, so that when I ask a bartender in a 13 training program how much booze do you pour in a 14 vodka and tonic, do you make Long Island iced 15 teas, I generally ask the managers and then I ask 16 the servers. 17 For example, a manager may often tell me 18 that, yes, a martini is supposed to be 19 three-quarters of an inch from the top. And then 20 I'll ask a server when you bring a glass to the 21 table, do you spill it? Oh, yes. So then it's 22 really like, what, when you get it from the bar, 23 up to the top or a quarter of an inch from the 24 top, isn't it? Oh, yes.</p>	<p style="text-align: right;">Page 66</p> <p>1 that come in a glass? 2 MR. FARRAH: Objection. 3 A. Well, delivered to the guest a straight up martini 4 would probably be about a quarter of an inch from 5 the top. 6 Q. Okay. 7 A. If it's a four and a half ounce up glass, to chill 8 it over ice it would take at least two and a half 9 ounces worth of 80 proof booze, which is 10 pharmacologically two drinks in one glass. 11 Q. Okay. You've previously taught that two and a 12 half ounces of vodka will fill a four and a half 13 ounce martini type glass to within a quarter of an 14 inch, based on the amount of alcohol and the 15 amount of melt off from the ice, correct? 16 MR. FARRAH: Objection. 17 A. Correct. 18 Q. Okay. And that gives it a perceived value of a 19 full drink, correct? 20 A. Yes, sir. 21 Q. Okay. So a four and a half ounce martini type 22 glass has a perceived value of being full with 23 only two and a half ounces of vodka, correct? 24 A. Perhaps, yes.</p>

<p style="text-align: right;">Page 67</p> <p>1 MR. FARRAH: Objection.</p> <p>2 Q. Well, not perhaps. Yes or no?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Now, under Paragraph 3, and then it's got</p> <p>5 subparagraphs, instead of alphabet you've got</p> <p>6 numbers 1 through 13. These are the materials</p> <p>7 that you reviewed in order to make your opinion in</p> <p>8 this case, correct?</p> <p>9 A. Yes. At this point -- at the time this was</p> <p>10 written.</p> <p>11 MR. FARRAH: I'm sorry, I was making a</p> <p>12 note about the last question. Did you ask him</p> <p>13 about the documents that are listed under --</p> <p>14 MR. GILLIS: 3.</p> <p>15 MR. FARRAH: -- 3, 1 through 13, the</p> <p>16 documents he reviewed as part of his preparation</p> <p>17 of his Rule 26 report?</p> <p>18 MR. GILLIS: Yes.</p> <p>19 MR. FARRAH: Okay. Thank you.</p> <p>20 Q. And I think you testified earlier that since that</p> <p>21 time you haven't reviewed any other documents,</p> <p>22 correct?</p> <p>23 A. Correct.</p> <p>24 Q. Okay. Are there any documents that you wish you</p>	<p style="text-align: right;">Page 70</p> <p>1 that affidavit?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. I -- no.</p> <p>4 Q. Okay. Are you aware that his Rule 26 disclosure</p> <p>5 states that at the time of the last service of</p> <p>6 alcohol he believes that the blood alcohol for</p> <p>7 Mr. Southworth was .149, and not in the range of</p> <p>8 .18 to .22 that's in that affidavit?</p> <p>9 MR. FARRAH: Objection.</p> <p>10 A. No.</p> <p>11 Q. If you had that information, would it change your</p> <p>12 opinion in this case?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. Probably not.</p> <p>15 Q. Okay. So .22 is almost 50 percent higher than a</p> <p>16 .15, correct?</p> <p>17 A. If you do the math, yes.</p> <p>18 Q. Okay. And the fact that his opinion now is 50</p> <p>19 percent lower than what it was when you reviewed</p> <p>20 his affidavit, you don't believe that that would</p> <p>21 have any effect on your opinion in this case?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. My opinion is based on the responsible service of</p> <p>24 alcohol. And the BAC has some significance, but</p>
<p style="text-align: right;">Page 68</p> <p>1 had had to review in this case that you haven't</p> <p>2 reviewed already?</p> <p>3 A. Not that I can think of.</p> <p>4 Q. Okay. And again, Number 2, the affidavit of David</p> <p>5 Benjamin, just so we're clear, you're considering</p> <p>6 that the 60(j) affidavit in this case, correct?</p> <p>7 A. I don't know what that means.</p> <p>8 Q. Okay.</p> <p>9 MR. FARRAH: I think you've already asked</p> <p>10 him. I'm pretty sure that's what he's testified</p> <p>11 to.</p> <p>12 MR. GILLIS: Off the record.</p> <p>13 (Discussion held off the record.)</p> <p>14 Q. I had asked you earlier if you had seen</p> <p>15 Dr. Benjamin's affidavit pursuant to his -- what's</p> <p>16 commonly referred to as a 60(j) affidavit.</p> <p>17 Do you know what a 60(j) affidavit is?</p> <p>18 A. No, sir.</p> <p>19 Q. Okay. Have you ever heard that term before?</p> <p>20 A. I don't think so.</p> <p>21 Q. Okay.</p> <p>22 MR. FARRAH: There's a chance you'll</p> <p>23 learn something.</p> <p>24 THE WITNESS: Thank you.</p>	<p style="text-align: right;">Page 71</p> <p>1 I'm not a toxicologist, so --</p> <p>2 Q. Okay. Well, you understand that --</p> <p>3 MR. FARRAH: Let him finish his answer,</p> <p>4 please.</p> <p>5 Q. I'm sorry. Finish your answer.</p> <p>6 MR. FARRAH: There's was a so. I don't</p> <p>7 know many people who end their sentences with so.</p> <p>8 Q. Were you finished?</p> <p>9 A. Probably.</p> <p>10 Q. Okay.</p> <p>11 A. The context is.</p> <p>12 Q. Okay. You'd agree, though, that a .07 blood</p> <p>13 alcohol difference would indicate to you less</p> <p>14 service of alcohol to an individual, correct?</p> <p>15 MR. FARRAH: Objection.</p> <p>16 A. Conceivably.</p> <p>17 Q. Conceivably or --</p> <p>18 A. Well, it depends. I mean, from what I know about</p> <p>19 blood alcohol content, it could rise up to two</p> <p>20 hours after the person stopped drinking.</p> <p>21 So if they had a lot of drinks</p> <p>22 beforehand, it depends on when they did the BAC.</p> <p>23 But if he had food in his stomach, that would slow</p> <p>24 alcohol's rate of entry into the bloodstream, but</p>
<p style="text-align: right;">Page 69</p> <p>1 (Pause.)</p> <p>2 A. Yes, that looks familiar to me.</p> <p>3 MR. FARRAH: Wait. How can you -- it's</p> <p>4 upside down. It's upside down.</p> <p>5 Q. I'm going to show you a document and ask you if</p> <p>6 you recognize it.</p> <p>7 MR. FARRAH: Take your time.</p> <p>8 (Pause.)</p> <p>9 A. Yes, I believe this is the one that I reviewed.</p> <p>10 Q. All right. I'll take that back and just take a</p> <p>11 one-minute break to copy it. We'll mark that when</p> <p>12 we get it.</p> <p>13 (Short break was taken.)</p> <p>14 (Exhibit No. 6, affidavit, marked for</p> <p>15 identification.)</p> <p>16 Q. This affidavit, which has been marked as</p> <p>17 Exhibit 6, when you state that you reviewed the</p> <p>18 affidavit of Dr. Benjamin, that's the one that</p> <p>19 you're referring to, correct?</p> <p>20 A. Yes, sir.</p> <p>21 Q. Have you referred to any further reports or</p> <p>22 deposition testimony of Dr. Benjamin?</p> <p>23 A. No, I haven't.</p> <p>24 Q. Are you aware that his opinion has changed since</p>	<p style="text-align: right;">Page 72</p> <p>1 ultimately it would get there.</p> <p>2 Q. Did you -- as part of your determination of</p> <p>3 whether or not there was appropriate service in</p> <p>4 this case, did you determine how many drinks</p> <p>5 Mr. Southworth had -- excuse me, Mr. Southworth</p> <p>6 was served while he was at the Longhorn on</p> <p>7 September 26th, 2003?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 A. There was conflicting testimony, but I understand</p> <p>10 that it was roughly two 25 ounce beers and three</p> <p>11 Manhattans.</p> <p>12 Q. Okay. That's what you're basing your opinion on,</p> <p>13 the assumption of that number of drinks?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. I don't know the exact number of drinks. I'm</p> <p>16 basing it on the speed and the amount of alcohol,</p> <p>17 based on the number of people at the table.</p> <p>18 Q. Okay. So as part of your opinion in this case,</p> <p>19 you don't have an opinion as to how much alcohol</p> <p>20 was served to Mr. Southworth in total while at the</p> <p>21 Longhorn, correct?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 Q. Regardless of time?</p> <p>24 MR. FARRAH: Object.</p>

<p style="text-align: right;">Page 73</p> <p>1 A. I don't know the exact amount, no.</p> <p>2 Q. But when you say you don't know the exact amount,</p> <p>3 do you have an estimate of what he drank at the</p> <p>4 Longhorn?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. The estimate would be two 25 ounce beers and three</p> <p>7 Manhattans.</p> <p>8 MR. FARRAH: Is this at the table or the</p> <p>9 bar, or where?</p> <p>10 THE WITNESS: From the time they arrived</p> <p>11 until --</p> <p>12 (Discussion held off the record.)</p> <p>13 Q. Is it fair to say that your estimate of two 25</p> <p>14 ounce beers and three Manhattans is based on the</p> <p>15 amount of alcohol you believe Mr. Southworth was</p> <p>16 served during the entire time he was at the</p> <p>17 Longhorn Steakhouse on September 26th, 2003?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. Again, I don't know the exact amount he was served</p> <p>20 in the time he was there. I'm going based on Jude</p> <p>21 Connolly's testimony.</p> <p>22 I'm also going based on Lee's testimony</p> <p>23 of the three Manhattans that she told the police</p> <p>24 or said that she had served him or he had</p>	<p style="text-align: right;">Page 76</p> <p>1 effect of a 12 ounce beer or a five ounce glass of</p> <p>2 wine or a one ounce glass of 100 proof liquor</p> <p>3 would have on a 210-pound experienced drinker?</p> <p>4 MR. FARRAH: Object.</p> <p>5 A. As in BAC, or is it observable cues? And it would</p> <p>6 matter depending on the issues. I mean, there's a</p> <p>7 number of different issues.</p> <p>8 I can't -- I don't think anybody can say</p> <p>9 that guy's at a .10. I mean, you can't pick that</p> <p>10 out.</p> <p>11 Q. Okay. You'd agree with me, though, that it's</p> <p>12 likely, with the same amount of alcohol, that</p> <p>13 someone like Mr. Southworth, who weighs 210</p> <p>14 pounds, would have less of a blood alcohol than</p> <p>15 150-pound person, correct?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. Yes.</p> <p>18 Q. Okay. How much less?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. I think from one of the charts I've seen over the</p> <p>21 years, a 200-pound man has six drinks in an hour,</p> <p>22 his BAC would be a .10. So somewhere in --</p> <p>23 Q. Okay. And if he's over that, then it would be</p> <p>24 slightly less? If he's 210 or 220, it might be</p>
<p style="text-align: right;">Page 74</p> <p>1 consumed.</p> <p>2 I don't know that they know the exact</p> <p>3 amount of alcohol, because I mean there seems to</p> <p>4 be some discrepancy about -- everybody seemed to</p> <p>5 be drinking beers, but there was only two beers on</p> <p>6 the check. So there was a cash transaction at the</p> <p>7 bar. It could have been a cash transaction</p> <p>8 throughout. I really don't know.</p> <p>9 Q. But this number that you're coming up with, this</p> <p>10 isn't just at the table, this is your estimate for</p> <p>11 what he drink at the table and the bar that</p> <p>12 evening, correct?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. As far as I know.</p> <p>15 Q. Okay. You're not aware of more alcohol being</p> <p>16 served to him that evening at the Longhorn other</p> <p>17 than what you've just testified to, the two 25</p> <p>18 ounce beers and the three Manhattans, correct?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. I have no knowledge of that.</p> <p>21 Q. Now, you in your training programs talk about the</p> <p>22 effect of a 12 ounce beer or five ounce glass of</p> <p>23 wine or one ounce glass of 100 proof liquor all</p> <p>24 being the same amount of alcohol, correct?</p>	<p style="text-align: right;">Page 77</p> <p>1 slightly less?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. Well, it would depend on body fat as well.</p> <p>4 Q. Have you seen pictures of Mr. Southworth?</p> <p>5 A. I don't believe I have, no.</p> <p>6 Q. So you don't know if he's thin or fat or muscular</p> <p>7 or -- correct?</p> <p>8 A. No.</p> <p>9 Q. Do you think that would be important to your</p> <p>10 opinion in this case?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. Not -- no, not in the amount of alcohol in the</p> <p>13 period of time, I don't believe it would change</p> <p>14 much.</p> <p>15 Q. Okay.</p> <p>16 (Pause.)</p> <p>17 Q. You state that you became Bar Code certified in</p> <p>18 2001, correct?</p> <p>19 A. Yes, sir.</p> <p>20 Q. You're not a Bar Code trainer, correct?</p> <p>21 A. No, sir.</p> <p>22 Q. Okay. You went and you got your car Bar Code</p> <p>23 certificate at that time, correct?</p> <p>24 A. Yes.</p>
<p style="text-align: right;">Page 75</p> <p>1 A. Yes.</p> <p>2 Q. And they all include .05 pure alcohol, correct;</p> <p>3 .05 ounces?</p> <p>4 A. A half an ounce of pure alcohol.</p> <p>5 Q. I'm sorry, a half an ounce.</p> <p>6 And you also, in your materials, you</p> <p>7 state that any one of those three drinks in</p> <p>8 150-pound male is roughly the equivalent of a</p> <p>9 blood alcohol of .025, correct?</p> <p>10 MR. FARRAH: You said in his training</p> <p>11 materials?</p> <p>12 A. Basically I said four drinks in an hour for</p> <p>13 150-pound man on an empty stomach would bring that</p> <p>14 man's BAC to a .10.</p> <p>15 Q. Right.</p> <p>16 A. So you're breaking it down into one would be .025,</p> <p>17 a quarter of that.</p> <p>18 Q. Okay. That's how you get to that?</p> <p>19 A. Basically.</p> <p>20 Q. In fact, in the TIPS materials, it says two drinks</p> <p>21 is --</p> <p>22 A. Is .05, and four drinks is .10.</p> <p>23 Q. And are you aware of what effect -- whether it's</p> <p>24 .02 or .025 or .03 for that matter, what the</p>	<p style="text-align: right;">Page 78</p> <p>1 Q. Have you ever renewed that certificate?</p> <p>2 A. No.</p> <p>3 Q. So that certificate is no longer valid, correct?</p> <p>4 A. No, you're certified for life in that program.</p> <p>5 Q. There's no every three years, like the TIPS?</p> <p>6 A. They've since disbanded Bar Code, because -- I</p> <p>7 don't really know the reason why, but now they</p> <p>8 call it Serve Safe Alcohol, and they require that</p> <p>9 more quality controls are built into the program,</p> <p>10 and they require that they be recertified every</p> <p>11 three years.</p> <p>12 Q. And when -- are you aware that Bar Code in 2003</p> <p>13 required retraining every three years?</p> <p>14 A. I don't believe I have an expiration -- I'm not</p> <p>15 sure in 2003. I was certified in '01, I believe,</p> <p>16 so I don't -- can't answer that.</p> <p>17 Q. Okay. Have you taken any Bar Code courses since</p> <p>18 2001?</p> <p>19 A. No.</p> <p>20 Q. Okay. And you don't -- strike that.</p> <p>21 In Paragraph 5 at the bottom of Page 2 of</p> <p>22 your disclosure, you talk about the TIPS program,</p> <p>23 which stands for Training and Intervention</p> <p>24 Procedures, correct?</p>

<p style="text-align: right;">Page 79</p> <p>1 A. Yes, sir.</p> <p>2 Q. And that's the program you've been teaching for</p> <p>3 the last 22 years?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Going down to Paragraph 6 there, you agree</p> <p>6 that on the day of this accident that Bar Code was</p> <p>7 accepted as the industry -- in the industry, and</p> <p>8 was an appropriate procedure for responsible</p> <p>9 alcohol service practices?</p> <p>10 A. It contained appropriate procedures, yes.</p> <p>11 Q. Did you have any problems with the Bar Code</p> <p>12 program in September of 2006 -- of '03 as being an</p> <p>13 appropriate training program for bartenders and</p> <p>14 servers?</p> <p>15 MR. FARRAH: Objection to the form.</p> <p>16 A. It covered the basics. It all depends on who the</p> <p>17 trainer was, really, but it does cover the basics.</p> <p>18 Q. Well, isn't that true for no matter what program</p> <p>19 you have?</p> <p>20 A. Absolutely, I agree with that.</p> <p>21 Q. Including the TIPS program, correct?</p> <p>22 A. Absolutely, certainly.</p> <p>23 MR. FARRAH: You should both let one</p> <p>24 another finish before you speak again.</p>	<p style="text-align: right;">Page 82</p> <p>1 correct?</p> <p>2 A. I do not.</p> <p>3 Q. Okay. So you have absolutely no evidence that the</p> <p>4 manner in which he was operating his vehicle prior</p> <p>5 to it striking the Santiago vehicle was caused due</p> <p>6 to intoxication, correct?</p> <p>7 A. Run that question by me again? I'm sorry.</p> <p>8 Q. Do you have any evidence that it was intoxication</p> <p>9 of Mr. Southworth, and not some other factor, such</p> <p>10 as just driving fast, that caused the accident</p> <p>11 that evening?</p> <p>12 A. No.</p> <p>13 Q. Okay. Getting down to your last bullet in</p> <p>14 Paragraph 6, you talk about in my opinion, the</p> <p>15 following are ways Rare deviated from Bar Code and</p> <p>16 accepted industry standards in effect at the time</p> <p>17 of alcohol service on September 26th, 2003.</p> <p>18 Now, before we get into those nine</p> <p>19 paragraphs, are there any other variations that</p> <p>20 you're aware of today that are not included in</p> <p>21 those nine paragraphs?</p> <p>22 A. No.</p> <p>23 MR. FARRAH: In your opinion. In his</p> <p>24 opinion?</p>
<p style="text-align: right;">Page 80</p> <p>1 THE WITNESS: I'm sorry.</p> <p>2 MR. GILLIS: I think we're getting along</p> <p>3 okay.</p> <p>4 MR. FARRAH: Well, you may think so, but</p> <p>5 you should both let one another finish before you</p> <p>6 speak again.</p> <p>7 Q. So regardless of the program, the person training</p> <p>8 is important, correct?</p> <p>9 A. I would agree with that.</p> <p>10 Q. Okay. In one of your bullet paragraphs under</p> <p>11 Paragraph 6, there's one, two, three, four -- I</p> <p>12 think it's the fourth bullet, you said the</p> <p>13 deviation, which refers back to the Bar Code</p> <p>14 standard, was causally related to Mr. Southworth</p> <p>15 becoming intoxicated and then crashing the Dodge</p> <p>16 into the Santiago auto, correct?</p> <p>17 A. Yes, sir.</p> <p>18 Q. Okay. I understand -- strike that.</p> <p>19 You're not testifying as a toxicologist,</p> <p>20 correct?</p> <p>21 A. No, sir.</p> <p>22 Q. Okay. So you're not testifying as to what point</p> <p>23 during the evening Mr. Southworth became</p> <p>24 intoxicated, are you?</p>	<p style="text-align: right;">Page 83</p> <p>1 A. Not that I can --</p> <p>2 MR. FARRAH: Objection.</p> <p>3 Q. Okay. The first one that you put in there is that</p> <p>4 they served him too much alcohol over too short a</p> <p>5 period of time, violating the Bar Code and</p> <p>6 industry standards, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. He was served five drinks over the course</p> <p>9 of an hour and 40 to an hour and 45 minutes, is</p> <p>10 that your understanding?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. No.</p> <p>13 Q. Okay. When was he started to be served alcohol at</p> <p>14 the Longhorn Steakhouse on September 26th, 2003?</p> <p>15 He --</p> <p>16 MR. FARRAH: Objection.</p> <p>17 Q. Him I assume you're referring to is</p> <p>18 Mr. Southworth, correct?</p> <p>19 A. Yes.</p> <p>20 MR. FARRAH: And I object to the</p> <p>21 question.</p> <p>22 A. I -- from my knowledge, at 8 o'clock is when he</p> <p>23 got started to be served at the bar.</p> <p>24 Q. Okay. And when was his last drink served to him?</p>
<p style="text-align: right;">Page 81</p> <p>1 A. I can't do that.</p> <p>2 Q. Okay. And you're not an accident</p> <p>3 reconstructionist, correct?</p> <p>4 A. No, sir.</p> <p>5 Q. Okay. Tell me the facts around the manner in</p> <p>6 which the Southworth vehicle was being operated</p> <p>7 prior to striking the Santiago vehicle.</p> <p>8 MR. FARRAH: Objection to the form.</p> <p>9 A. I really can't answer that.</p> <p>10 Q. Because you don't know?</p> <p>11 A. I don't recall the specifics on that. I didn't</p> <p>12 really focus on any of the written materials for</p> <p>13 that. It doesn't apply -- pertain to me. I'm</p> <p>14 more concerned with what happened at the Longhorn.</p> <p>15 Q. Okay. So you don't know if he was swerving</p> <p>16 through lanes, correct?</p> <p>17 A. I really don't.</p> <p>18 MR. FARRAH: Which he?</p> <p>19 MR. GILLIS: Mr. Southworth.</p> <p>20 MR. FARRAH: Sorry.</p> <p>21 Q. You don't know if he was inappropriately stopping</p> <p>22 or speeding up on the highway, correct?</p> <p>23 A. I do not.</p> <p>24 Q. You don't know if he fell asleep at the wheel,</p>	<p style="text-align: right;">Page 84</p> <p>1 A. Somewhere around --</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. Somewhere around 9:27, I think, is when the last</p> <p>4 drinks were served at the table.</p> <p>5 Q. Okay. And you base that on the order report you</p> <p>6 had?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. That and testimony from Jude Law, because he was</p> <p>9 with him at the bar.</p> <p>10 Q. Jude Connolly?</p> <p>11 A. Sorry about that. Jude Connolly.</p> <p>12 MR. FARRAH: Did you say Jude Law?</p> <p>13 THE WITNESS: Yes.</p> <p>14 A. And Espy.</p> <p>15 MR. GILLIS: E-S-P-Y.</p> <p>16 Q. Michael or Thomas?</p> <p>17 A. I think it was Thomas -- Scott he called him.</p> <p>18 Q. So that would be an hour and a half period of time</p> <p>19 over which he was served what you believe was five</p> <p>20 drinks, correct?</p> <p>21 MR. FARRAH: Objection.</p> <p>22 A. I don't believe there were five drinks. There</p> <p>23 were purported to be five drinks, but</p> <p>24 pharmacologically they weren't five drinks.</p>

<p style="text-align: right;">Page 85</p> <p>1 Q. We'll get into that, but there were five vessels 2 of alcohol that came -- 3 A. I'll go with a vessel. 4 Q. Okay. 5 MR. FARRAH: Objection to the question. 6 Q. The first drink -- what is your understanding was 7 the first drink served to Mr. Southworth that 8 evening, and at what time? 9 A. 25 ounce beer upon arrival. 10 Q. Okay. And you understand that that 25 ounce beer 11 includes the head on the beer as well, correct? 12 MR. FARRAH: Objection. 13 A. I would assume, but it depends on the beer that 14 night and whether it does have head. 15 Q. Well, did you read any testimony that a 25 ounce 16 beer actually only contains about 23 to 24 ounces 17 of beer in it? 18 MR. FARRAH: Did he read testimony to 19 that effect? 20 MR. GILLIS: Yes. 21 A. I don't recall reading testimony to that effect. 22 Q. Okay. 23 A. And if I did, I would still question it. 24 Q. Well, based on your experience, if a 25 ounce beer</p>	<p style="text-align: right;">Page 88</p> <p>1 A. I would say about 24 ounces. 2 Q. Okay. So a quarter inch from the top of the beer 3 mug, in your opinion, equates to 24 ounces, 4 correct? 5 A. Somewhere in that vicinity. 6 Q. What do you mean somewhere in that vicinity? 7 A. Could be off by a quarter of an ounce. 8 Q. Okay. And similar to the experiment you did here, 9 did you do any experiments on a 25 ounce glass to 10 determine how much liquid was in the glass when it 11 was filled to a quarter of an inch from the top? 12 A. I did not. 13 Q. Why not? 14 A. I never thought of doing it. I thought the most 15 dangerous cocktail was the Manhattan. 16 Q. Okay. When was the second drink served, in your 17 opinion, to Mr. Southworth at the Longhorn 18 Steakhouse on September 26th, 2003? 19 MR. FARRAH: Objection. 20 A. I would say right around the 8:20 or somewhere in 21 that same half hour at the bar, I would think. 22 Q. Okay. Do you have any criticism of serving a 23 second 25 ounce beer to Mr. Southworth at 8:20 24 that evening?</p>
<p style="text-align: right;">Page 86</p> <p>1 mug is filled with beer, how many ounces of beer 2 is in a glass? 3 A. In a 25 ounce -- 4 Q. Yes. 5 A. At least 24 ounces of beer. Could be 24 and a 6 half. 7 Q. Okay. You think -- 8 A. Could be 23, depending on the head and how the 9 bartender pours it and whether the customer 10 complains and the bartender succumbs to the 11 complaint, if you will. 12 Q. So you think it's right up to the very lip there? 13 MR. FARRAH: Objection. 14 A. No. I would say it might be about a quarter of an 15 inch from the top. 16 Q. And whatever that amount of volume is, that would 17 be -- you'd subtract from 25 and you'd have what 18 you drink, correct? 19 A. Somewhere in that vicinity, sure. 20 Q. And that's the way, in your experience doing this 21 business for 20-plus years, draft beers are 22 served, correct? 23 MR. FARRAH: Objection. 24 A. It depends on the establishment.</p>	<p style="text-align: right;">Page 89</p> <p>1 A. Yes. 2 Q. What is your criticism? 3 A. You're basically serving the customer four drinks 4 in a half an hour. That's a man with a purpose. 5 That's a man who's looking to get buzzed. 6 I might have -- you know, I would have 7 slowed him down at that point, tried to get him to 8 eat something. 9 Q. Was there food at the bar that night? 10 A. That wasn't -- I've read no testimony to that 11 effect. 12 Q. What efforts did you do to find out whether or not 13 there was food served at the bar that night, as 14 far as knickknacks on the bar? 15 MR. FARRAH: Beyond what he did in his 16 report? 17 MR. GILLIS: Beyond what's in the report. 18 MR. FARRAH: Thank you. 19 A. I do not know of anything -- I didn't do anything 20 on that. 21 Q. Okay. At that point, at 8:20 when he was served 22 the second beer, was Mr. -- are you aware of any 23 evidence that Mr. Southworth was showing any 24 visible signs of intoxication?</p>
<p style="text-align: right;">Page 87</p> <p>1 Q. Well, how did this establishment pour it? 2 A. I don't know. 3 Q. Did you ever make any effort to find out? 4 MR. FARRAH: Beyond whatever he says he 5 did in his report? 6 MR. GILLIS: Yes. 7 A. I have been there. And when I got a 25 ounce 8 beer, it was probably about a quarter of an inch 9 head from the top. 10 Q. Okay. When were you there? 11 A. Couple months back, I think. 12 Q. So you wrote your report before you went there, 13 correct? 14 A. I probably wrote my report after. After I went 15 there. So it must have been about four months 16 ago. 17 Q. Okay. 18 A. Four or five months ago. I can't remember the 19 exact -- 20 Q. So based on your experience of looking at glasses 21 and determining how much alcohol was in there, how 22 much beer did you determine was in the 25 ounce 23 glass of -- that you received when you went to the 24 Longhorn?</p>	<p style="text-align: right;">Page 90</p> <p>1 A. Not from any of the testimony that I read. 2 Q. Okay. Are you aware of it from any other source? 3 A. No. 4 Q. Okay. Are you aware at that point whether or not 5 any of his -- if you look -- any inhibitions that 6 he had changed in that time period? 7 MR. FARRAH: I'm sorry, I didn't -- did 8 you say any of his inhibitions had changed? 9 MR. GILLIS: Yes. 10 MR. FARRAH: Objection to the form. 11 A. I read no testimony that indicated that. 12 Q. You're not going to opine to that, are you? 13 A. No. If I have no evidence, I have no opinion. 14 Q. Okay. Did you see any signs at 8:20, from the 15 materials you read and from what you reviewed in 16 this case, that his judgment had changed by the 17 time he was served the second beer that night? 18 A. The only thing that I could say that would go into 19 the judgment category would be the speed at which 20 he consumed the first drink, and the fact that he 21 was on to the second drink right away. 22 So speed of drink is an issue that goes 23 in the judgment category, how fast a person 24 drinks.</p>

<p style="text-align: right;">Page 91</p> <p>1 Q. Well, the fact that a person drinks quickly 2 doesn't necessarily mean that they're intoxicated, 3 correct; that in and of by itself? 4 MR. FARRAH: Objection to the form. 5 A. It would lead you to believe that they were 6 planning on getting that way. The faster you 7 drink, the quicker you get drunk. 8 Q. Assuming you continue drinking? 9 A. Which he did. 10 Q. Okay. Well, that's an assumption you made that 11 when he got that second drink, he was intending to 12 get intoxicated? 13 MR. FARRAH: Objection. 14 A. No. That he was going to drink it. That he went 15 right to it. 16 Q. Would you -- if he ordered a second beer at 8:20, 17 and the first beer had been completed, as a 18 trainer would you tell the bartender not to give 19 him another drink? 20 A. What I might suggest to the bartender, here's some 21 ice water, you seem really thirsty. Would you 22 like me to get you a menu to see what you want to 23 eat? 24 Q. Okay. That doesn't answer the question. Would</p>	<p style="text-align: right;">Page 94</p> <p>1 down at that point. 2 I would suggest that I'll gladly serve 3 you a 12 ounce beer if you take your time with 4 this one, no problem, but I can't serve you these 5 as fast as you want to drink them, is basically 6 what I would train people to say. 7 Q. Okay. Would you train people not to give him that 8 second 25 ounce beer? Yes or no. 9 A. I would say probably not. 10 MR. FARRAH: Objection. 11 A. I would suggest that they would go with a smaller 12 beer and get them to pace him. Because it's hard 13 to take a drink away from somebody once you've 14 given it to them. 15 Q. Okay. And that's something you train in your 16 program? 17 A. Yes. 18 MR. FARRAH: Objection. 19 A. I would rather -- I'm sorry. 20 (Discussion off the record.) 21 A. I would suggest that they slow him down at this 22 point in time; that you begin to pace him, if you 23 will, and not serve him as fast. Because trying 24 to take a drink away from somebody after you've</p>
<p style="text-align: right;">Page 92</p> <p>1 you preclude him from getting another drink at 2 that point? 3 A. That size beer, yes. 4 Q. Okay. You would shut him off after -- 5 A. No, I didn't say that. 6 Q. That's my terminology. Let me -- you would not 7 serve another beer at 8:20 if he had been served a 8 beer -- a double beer at -- a 25 ounce beer at 9 8 o'clock and finished it by 8:20, is that 10 correct? 11 A. What I would do is try to slow him down and get 12 him to eat something, and maybe give him a glass 13 of ice water and say, listen, let's see if this 14 last one worked. Because I haven't had an 15 opportunity to see -- observe -- I've just served 16 him two beers in, you know, roughly ten minutes. 17 Q. Roughly 20 minutes. 18 A. Again, we're not sure of the exact time between 19 the time they got served and the time they got 20 there. 21 We know that he got there at 8 o'clock. 22 He could have had that -- so yes, roughly 20 23 minutes. It's still too -- it's drinking fast is 24 what it is.</p>	<p style="text-align: right;">Page 95</p> <p>1 given it to them is really difficult. 2 Q. What would be the appropriate amount of time, 3 assuming that the bartender served him the 25 4 ounce beer at 8 o'clock, before -- what would be 5 the appropriate amount of time, in your opinion, 6 before you would serve him a second 25 ounce beer? 7 MR. FARRAH: Objection. 8 A. Quite frankly, I don't think 25 ounce beers are 9 appropriate at all. I think 12 to 16 at the most. 10 And 16s I'm concerned about. 11 But I would have to gauge the person's 12 cues that they give me, and I would have to keep 13 into consideration the issues of BAC. 14 Q. Well, based on your review of the materials in 15 this case, and based on your review of what you 16 know about Mr. Southworth, at what point would it 17 have been appropriate for the bartender to serve 18 him a second 25 ounce beer on September 26th, 2003? 19 MR. FARRAH: Objection. 20 A. I might give him a half an hour before I'd serve 21 him the second 25 ounce beer, and I would still 22 continue to speak with him to get him to slow down 23 and have something to eat. 24 Q. Okay. So at 8:30, that would have been</p>
<p style="text-align: right;">Page 93</p> <p>1 Q. Let me get back to the question that you haven't 2 answered? Would you -- if he insisted on getting 3 another 25 ounce beer at 8:20, is it your 4 testimony that the bartender should not have 5 served him at that time? 6 MR. FARRAH: Objection. He has answered 7 the question. 8 A. I can only answer it by saying this is where 9 intervention should begin. 10 Q. Okay. And assuming he doesn't want a glass of 11 water or a menu, would you have served him another 12 25 ounce beer at that point? 13 MR. FARRAH: Objection. 14 A. Would I? No. 15 Q. Okay. Do you train people not to serve the second 16 25 ounce beer if they complete the first 17 one -- their first drink of the night at the bar 18 in 20 minutes? 19 MR. FARRAH: Objection. 20 A. If they drink rapidly, based on all the facts that 21 I know about this guy, that I know he came from 22 dirt biking, that he had been -- that he worked 23 out pretty heavy before he got there, I would try 24 to get him to eat something and get him to slow</p>	<p style="text-align: right;">Page 96</p> <p>1 appropriate? 2 A. It might have been. 3 Q. Okay. Again, judgment call by the bartender, 4 correct? 5 A. Yes, sir. 6 Q. Okay. And you're not surprised that a 21-year-old 7 guy out dirt biking might drink the first beer 8 quickly because he's thirsty, correct? 9 A. Absolutely not. I'm not surprised by that at all. 10 Q. And the fact that he would drink that quickly 11 doesn't in and of itself indicate that he will 12 continue to drink at that rate for the rest of the 13 evening, correct? 14 A. Nothing confirms it, but it would make me 15 suspicious. 16 Q. Okay. When, in your opinion, was the next drink 17 served to Mr. Southworth that evening? 18 MR. FARRAH: Objection. 19 A. I think it's at the table. 20 Q. Okay. Do you know at what time at the table? 21 A. I don't have the list of the times in which the 22 drinks were rung in on that check, but I think it 23 was somewhere around 9:12 or 8:50, or something 24 like that. I'm not sure. I'd have to look at the</p>

<p style="text-align: right;">Page 97</p> <p>1 check again.</p> <p>2 Q. As you sit here today you can't tell me when the</p> <p>3 next drink was served to Mr. Southworth, correct?</p> <p>4 MR. FARRAH: Objection.</p> <p>5 A. No.</p> <p>6 Q. Okay. Are you critical of when the next drink was</p> <p>7 served to Mr. Southworth?</p> <p>8 A. Yes, because the next drink wasn't just one drink,</p> <p>9 it was two to three drinks in one glass.</p> <p>10 Q. Okay. So your -- is your criticism limited to the</p> <p>11 amount of alcohol in the glass, or the time that</p> <p>12 it was served?</p> <p>13 A. Probably both.</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. I think -- I can't remember exactly, but the first</p> <p>16 round of drinks might have went out at 8:50.</p> <p>17 Q. Which would have been --</p> <p>18 A. I don't know why that sticks in my mind.</p> <p>19 Q. So that'd be about 30 minutes after he got his</p> <p>20 second beer, correct?</p> <p>21 A. Yes.</p> <p>22 Q. Are you critical to serve him a drink at 8:50 if</p> <p>23 he had been served a beer at -- the 25 ounce beer</p> <p>24 at 8:20?</p>	<p style="text-align: right;">Page 100</p> <p>1 amount of alcohol in that drink, as you allege.</p> <p>2 I'm just talking about time frame now.</p> <p>3 Was that an appropriate interval between</p> <p>4 drinks.</p> <p>5 MR. FARRAH: He can't answer. He's</p> <p>6 already told you that.</p> <p>7 A. It's -- again, it would be based on the issues</p> <p>8 that we -- I just discussed. I really can't give</p> <p>9 you a firm answer to that one, because as we</p> <p>10 talked about before, it would be a judgment call</p> <p>11 on all the issues, and it would concern me.</p> <p>12 Q. Okay. So you're not going to testify at trial</p> <p>13 that that time period of 30 minutes between the</p> <p>14 second beer and the subsequent drink in and of</p> <p>15 itself was too short a period of time to serve him</p> <p>16 another drink, correct?</p> <p>17 MR. FARRAH: Objection to the form.</p> <p>18 A. It may have been too short a period of time, it</p> <p>19 may not have been. It depends on the cues. But</p> <p>20 it would probably be, I would say -- again, if you</p> <p>21 go with the guidelines for Bar Code, it would be</p> <p>22 inappropriate because it was ten minutes shy of</p> <p>23 the one hour for four drinks, because those were</p> <p>24 two 25 ounce drafts.</p>
<p style="text-align: right;">Page 98</p> <p>1 A. Yes, because the drink he was getting served was</p> <p>2 three drinks -- two to three drinks in one glass.</p> <p>3 Q. Okay. Time wise, though, was that an appropriate</p> <p>4 time period, 30 minutes, for him to complete the</p> <p>5 25 ounce beer?</p> <p>6 A. I can't say that that's true. If you look at the</p> <p>7 Bar Code program, people his size would have three</p> <p>8 to four beers in an hour is what they gave you as</p> <p>9 a gauge or a reference, and then maybe one drink</p> <p>10 at a time thereafter to watch as it progresses.</p> <p>11 Q. Okay. Maybe I'm not articulating my question.</p> <p>12 You stated earlier that on the first</p> <p>13 drink you would have liked to have seen 30 minutes</p> <p>14 between the first 25 ounce beer and the second 25</p> <p>15 ounce beer, correct?</p> <p>16 A. At a minimum.</p> <p>17 Q. And you're now stating that between 8:20 and 8:50,</p> <p>18 that's 30 minutes between the second 25 ounce beer</p> <p>19 and the first Manhattan, correct?</p> <p>20 A. Yes.</p> <p>21 Q. Do you think that time period in and of</p> <p>22 itself -- I understand you're saying there's too</p> <p>23 much alcohol in the Manhattan, but the time frame</p> <p>24 alone, was that an appropriate time frame between</p>	<p style="text-align: right;">Page 101</p> <p>1 Q. Well, what is your opinion? You said it may be,</p> <p>2 it may not be. What is it? Is it or is it not?</p> <p>3 A. I would say it wouldn't be.</p> <p>4 Q. Okay, fine. Now, let's get to the drink. The</p> <p>5 Manhattan that was -- the first Manhattan that was</p> <p>6 served to Mr. Southworth at the table that night</p> <p>7 was, you believe, 8:50, correct?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 A. I -- without looking at the check, it's -- I think</p> <p>10 it was somewhere around -- I don't know why 8:50</p> <p>11 sticks in my mind, but it does. If I could look</p> <p>12 at the check, maybe I would be able to say that</p> <p>13 that is, in fact, the time.</p> <p>14 Q. Okay. You want to see the check?</p> <p>15 A. That'd be good.</p> <p>16 MR. GILLIS: Let's take a break and get</p> <p>17 it.</p> <p>18 (Short break was taken.)</p> <p>19 Q. Okay. I'm going to show you a document and ask</p> <p>20 you if you recognize it.</p> <p>21 MR. FARRAH: Take a moment, look at it.</p> <p>22 Make sure you have enough time.</p> <p>23 A. I know I've seen it.</p> <p>24 Q. Okay. On the bottom of the first page at 8:40</p>
<p style="text-align: right;">Page 99</p> <p>1 drinks at that point before he would be served</p> <p>2 some other cocktail?</p> <p>3 MR. FARRAH: If you can answer the</p> <p>4 question.</p> <p>5 A. I can't answer that question really, only because,</p> <p>6 again, there's a -- the fact that he had worked</p> <p>7 out hard, as far as dirt biking is concerned, that</p> <p>8 he was probably dehydrated or whatever. He might</p> <p>9 have been tired at that point. Maybe it would be</p> <p>10 time to not serve him any alcohol, just get him to</p> <p>11 eat something. I really can't say. I wasn't</p> <p>12 there.</p> <p>13 Q. Okay. So you don't have an opinion as you sit</p> <p>14 here today whether or not it was appropriate or</p> <p>15 inappropriate to serve him a drink at 8:50, just</p> <p>16 based on time, if his last drink had been served</p> <p>17 to him, the 25 ounce beer, at 8:20?</p> <p>18 MR. FARRAH: Objection to the form.</p> <p>19 A. It wasn't a drink. It was two to three drinks.</p> <p>20 And in that circumstance, I would say it would be</p> <p>21 inappropriate.</p> <p>22 Q. Okay. I'm going to get to that.</p> <p>23 A. I'm sorry.</p> <p>24 Q. I'm going to get to the inappropriateness of the</p>	<p style="text-align: right;">Page 102</p> <p>1 where it says Leigh, that's the server, and it's</p> <p>2 Table 52?</p> <p>3 A. Yes.</p> <p>4 Q. I'm going to suggest to you that that was</p> <p>5 the -- that was the table that has been alleged</p> <p>6 Mr. Southworth was sitting at that evening.</p> <p>7 And if you look at the second page, under</p> <p>8 8:51, it shows seven Jack Daniel Manhattans being</p> <p>9 served to Table 52. Do you see that?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And is it your understanding that when it</p> <p>12 says Jack Daniels and then Manhattan next, those</p> <p>13 two combined make one Jack Daniels Manhattan,</p> <p>14 correct?</p> <p>15 MR. FARRAH: Objection.</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And so 8:51 is your understanding of when</p> <p>18 Mr. Southworth got his first Manhattan that</p> <p>19 evening?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. I'm a little confused about this. On the first</p> <p>22 page at 8:40 Jack Daniels were ordered. One, two,</p> <p>23 three of them.</p> <p>24 Q. Correct. And how many people sitting at the</p>

<p style="text-align: right;">Page 103</p> <p>1 table?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. The table at the time?</p> <p>4 Q. Yes.</p> <p>5 A. Would be seven.</p> <p>6 Q. And was it your understanding that there were</p> <p>7 three people, including Mr. Southworth, at the bar</p> <p>8 before the table?</p> <p>9 A. Yes.</p> <p>10 Q. And there were four people who came in from</p> <p>11 outside the restaurant to join them for dinner,</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And the seven of them sat together. Is</p> <p>15 that your understanding of the facts?</p> <p>16 A. Yes.</p> <p>17 Q. And is it your understanding that that first round</p> <p>18 of four drinks is for the four people who walked</p> <p>19 in?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. It may have been. Hang on a minute now. I know</p> <p>22 they all met at the bar, but I don't recall</p> <p>23 testimony that they got served at the bar either.</p> <p>24 I think they went right to the table.</p>	<p style="text-align: right;">Page 106</p> <p>1 Q. Right. Three Manhattans and one Bud. Four total,</p> <p>2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. And that's because of the four people that came</p> <p>5 in?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. Okay. I'm sorry.</p> <p>8 Q. But to the table there were appetizers served,</p> <p>9 correct?</p> <p>10 A. They were ordered, yes.</p> <p>11 Q. Okay. And what's your opinion as to when those</p> <p>12 appetizers that are ordered at 8:40 arrived at the</p> <p>13 table?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. I really don't know.</p> <p>16 Q. Do you have an opinion on whether or not they</p> <p>17 reached the table before the next round of drinks</p> <p>18 was ordered?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. Which would be 8:51?</p> <p>21 Q. Yes.</p> <p>22 A. It's possible.</p> <p>23 Q. Okay. Do you remember Leigh Chabot saying that</p> <p>24 she went and got the appetizers right away</p>
<p style="text-align: right;">Page 104</p> <p>1 Q. Okay. Is it your understanding that the four guys</p> <p>2 who were not with Mr. Southworth at the bar came</p> <p>3 in from the outside and got their first drink at</p> <p>4 the table?</p> <p>5 A. Yes.</p> <p>6 Q. Okay.</p> <p>7 A. Yes, that would be true.</p> <p>8 Q. And at 8:40, those four drinks would be the four</p> <p>9 guys who joined Mr. Southworth at the table,</p> <p>10 correct?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. You can assume that.</p> <p>13 Q. That's a logical assumption, correct?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. I would think it would be.</p> <p>16 Q. And that's based on your training and experience</p> <p>17 that assumption, correct?</p> <p>18 A. Again, it's merely an assumption.</p> <p>19 Q. Okay. Well, that's the assumption you made for</p> <p>20 your opinion here, because you weren't there,</p> <p>21 correct?</p> <p>22 A. I was not.</p> <p>23 Q. Okay. So all of your statements as to what are</p> <p>24 facts here are based on your assumptions based on</p>	<p style="text-align: right;">Page 107</p> <p>1 before -- right after she put in the order?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And she brought bread and so forth to the</p> <p>4 table, correct?</p> <p>5 A. Yes.</p> <p>6 Q. And she brought water to the table, correct?</p> <p>7 A. I don't recall her saying that, but if you say</p> <p>8 that that happened, I don't recall the exact --</p> <p>9 Q. Well, what are you -- what's your understanding of</p> <p>10 whether or not water was brought to the table that</p> <p>11 evening?</p> <p>12 A. I wasn't -- I don't remember. I don't recall</p> <p>13 reading that.</p> <p>14 Q. Okay. So you don't have an opinion one way or the</p> <p>15 other?</p> <p>16 A. Right.</p> <p>17 Q. You're not saying it didn't happen, correct?</p> <p>18 A. No, sir.</p> <p>19 Q. And you're not saying it did happen?</p> <p>20 A. No, sir.</p> <p>21 Q. Okay. At 8:51 that round of Jack Daniels was</p> <p>22 ordered, correct?</p> <p>23 A. Yes.</p> <p>24 Q. What -- now, did you read the testimony of Kristen</p>
<p style="text-align: right;">Page 105</p> <p>1 your education, training and experience, correct?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. More to the testimony of Leigh Chabot and Jude</p> <p>4 Connolly.</p> <p>5 Q. Okay. Those you gave more weight to, correct?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. Yes.</p> <p>8 Q. But you looked at all of it in order to come up</p> <p>9 with what you thought was the most reasonable fact</p> <p>10 pattern, correct?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. Certainly.</p> <p>13 Q. And all of the things you looked at and the</p> <p>14 documents that we've previously talked about</p> <p>15 listed in your report, correct?</p> <p>16 A. Yes.</p> <p>17 Q. Now, if you look at that -- at 8:40 you'll see</p> <p>18 that they had already been served to the table</p> <p>19 chicken fingers, two cups of chowder, a Tonion,</p> <p>20 along with the drinks that were served at that</p> <p>21 time, correct?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. That also goes over to the following page where it</p> <p>24 says one 25 ounce Bud Light, too.</p>	<p style="text-align: right;">Page 108</p> <p>1 O'Donnell?</p> <p>2 A. Yes.</p> <p>3 Q. Who is Kristen O'Donnell?</p> <p>4 A. She's a bartender that was on duty that night.</p> <p>5 Q. Okay. Did you read what she testified to as to</p> <p>6 how much alcohol she put in the drink, the</p> <p>7 Manhattans that evening?</p> <p>8 A. I remember her saying that she poured it so that</p> <p>9 it would be a quarter of an ounce -- a quarter of</p> <p>10 an inch from the top. And what she did is she put</p> <p>11 it in a seven ounce glass, filled it with ice,</p> <p>12 poured from that glass, strained it into the</p> <p>13 martini glasses.</p> <p>14 She put up seven martini glasses, poured</p> <p>15 the ingredients into a glass filled with ice, and</p> <p>16 then strained it into each one.</p> <p>17 Q. Did she shake it?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. I don't recall her saying that she shook it.</p> <p>20 Q. Okay. Do you have an opinion one way or the other</p> <p>21 whether she shook it or didn't shake it?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. I don't have an opinion on that specifically. I</p> <p>24 sense that she might have just put it in there and</p>

<p style="text-align: right;">Page 109</p> <p>1 then strained it right out, because it was busy at 2 the time. 3 Q. Okay. When you sense it, is that a guess? 4 MR. FARRAH: Objection. Are you asking 5 him if he remembers what the testimony was? 6 MR. GILLIS: No. I think the question 7 was pretty clear. He can answer it. 8 A. I would -- I can't say that it's a guess or not. 9 I think she was in a rush to satisfy the orders 10 that were being called upon her at that point in 11 time, and she had to make -- she made it in 12 each -- each individual drink in that glass filled 13 with ice and then strained it in. That's all I 14 recall her saying in the testimony. I don't 15 recall her saying she shook it. 16 Q. Where in the testimony does it say that she was 17 rushed to make these drinks that evening? 18 A. She didn't say she was rushed. They had to wait 19 for a table. It was busy that night. The 20 testimony indicates that it was busy that night, 21 that's all I remember. 22 Q. Okay. So you have no -- 23 A. At that point in time. 24 Q. Okay. You have no evidence that she was in any</p>	<p style="text-align: right;">Page 112</p> <p>1 A. Just what I put in my report. 2 Q. Okay. You don't have a specific amount of alcohol 3 in each drink, correct? 4 MR. FARRAH: Objection. 5 A. I don't have a specific amount right on the money, 6 no. 7 Q. Okay. Now, what did Kristen O'Donnell say was the 8 amount of alcohol she put in the drink? 9 A. I think she said she followed the recipe, which is 10 two ounces of Jack Daniels and a quarter of an 11 ounce of vermouth. 12 Q. Well, you think or you know? 13 A. That's what I think. I'd have to look at her 14 testimony to find that. 15 Q. Okay. Her actual testimony was she put an ounce 16 and a quarter of Jack Daniels in the drink. Do 17 you remember that? 18 MR. FARRAH: Objection. 19 A. That would -- 20 MR. FARRAH: I'm sorry, I didn't hear 21 your answer. 22 A. I don't know. I remember -- I think it was Leigh 23 that said there's an ounce that goes in there, and 24 they normally use a jigger. And you might be</p>
<p style="text-align: right;">Page 110</p> <p>1 rush to make those specific drinks that evening, 2 correct? 3 MR. FARRAH: Objection. 4 A. Only assumptions. 5 Q. Okay. Assumptions based on what facts? 6 A. On the facts that they had to wait for a table, 7 that the place was busy. 8 Q. Okay. 9 A. Is the testimony that I read. 10 Q. How many people were serving drinks that night 11 from behind the bar? 12 MR. FARRAH: I'm sorry, from the end of 13 the bar? 14 MR. GILLIS: From behind the bar. 15 MR. FARRAH: How many bartenders were -- 16 MR. GILLIS: That wasn't my question. 17 Q. How many people were serving drinks from -- 18 A. I think there were two, or maybe three. 19 Q. And how many people does the place seat? 20 A. I don't know. 21 Q. So how can you determine whether or not she was 22 rushed based on the capacity and the people having 23 to wait for tables if you don't even know how many 24 tables are in the place?</p>	<p style="text-align: right;">Page 113</p> <p>1 right on that. I think it might be -- she might 2 have testified an ounce and a half. I apologize. 3 Q. Well, whether it was a double or triple drink, 4 wouldn't it be important to know how much alcohol 5 the bartender said she put in the drink to 6 determine that? 7 A. I wouldn't take credence in the bartender. If the 8 bartender told me that it was a quarter of an inch 9 from the top, then what she says doesn't match 10 what was real. 11 Q. Okay. Did she say in her deposition that she 12 usually puts it an inch from the top? Did you 13 read that? 14 A. She -- I think she said something to that effect, 15 and then she puts the maraschino cherry in it, and 16 it brings it right up to a quarter of an inch. 17 Q. She said it never goes above a quarter of an inch? 18 A. Correct. And the maraschino cherry -- 19 Q. So is it your testimony that it was two -- so what 20 was her testimony? She normally does it to an 21 inch from the top -- 22 MR. FARRAH: Objection. 23 Q. -- or that it never -- 24 A. If I could look at her deposition again in that</p>
<p style="text-align: right;">Page 111</p> <p>1 MR. FARRAH: Objection. 2 A. All I know is somebody -- they said it was busy in 3 their testimony, and I can't remember if it was 4 Leigh or it was Kristen that said it, but 5 they -- what I did read is that it was busy. I 6 can't -- other than that -- I can't assume any 7 more than that. 8 Q. Assuming it was busy, what evidence do you have 9 that they didn't have appropriate number of 10 personnel to handle a busy restaurant that 11 evening? 12 MR. FARRAH: Objection. 13 A. I don't. 14 Q. Okay. So you have no evidence that she was in any 15 rush to make those drinks at 8:51 that evening, 16 correct? 17 MR. FARRAH: Objection. 18 A. No, I don't. 19 (Pause.) 20 Q. Are you going to render an opinion in this case as 21 to how much alcohol was in each of those drinks 22 when they left the bar and went to the table that 23 evening for that round of Manhattans at 8:51? 24 MR. FARRAH: Objection.</p>	<p style="text-align: right;">Page 114</p> <p>1 area, I could -- I can't confirm it on -- from the 2 top of my head. 3 I do recall that she -- her saying that 4 putting the maraschino cherry brings it up to no 5 more than a quarter of an inch from the top. 6 Q. Okay. At no time in her deposition did she ever 7 say that it goes higher than a quarter of an inch 8 from the top of the glass, correct? 9 A. Not that I recall, no. 10 Q. And her practice was, when she was serving tables, 11 to put it an inch from the top, do you remember 12 that testimony? 13 MR. FARRAH: Objection. 14 A. I can't remember specifically, but I can -- if 15 you -- 16 Q. Assuming that's her testimony, isn't that 17 important in determining whether or not that was a 18 double or a triple drink? 19 MR. FARRAH: Objection. 20 A. If it was in fact true, it would be important. 21 Q. Okay. And what evidence do you have that that's 22 not true? 23 MR. FARRAH: That what's not true? 24 Q. That she pours it to an inch -- that it comes to</p>

<p style="text-align: right;">Page 115</p> <p>1 an inch from the top of the glass?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. That she said that the drink ultimately goes out</p> <p>4 at a quarter of an inch from the top, no more. To</p> <p>5 do that, you'd have to pour more alcohol than hat</p> <p>6 she claims that she pours.</p> <p>7 Q. Okay. So you --</p> <p>8 A. Based on my experience as a bartender.</p> <p>9 Q. You claim that she said that her drinks go up to a</p> <p>10 quarter of an inch all the time when they go out?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. Based on what you just told me, unless I get the</p> <p>13 deposition again to refresh my memory, no more</p> <p>14 than a quarter of an inch from the top.</p> <p>15 Q. Okay. Well, the testimony is --</p> <p>16 MR. FARRAH: That's right, the testimony</p> <p>17 is what the testimony is.</p> <p>18 Q. But you're basing it -- so as you sit here today,</p> <p>19 you don't know exactly what you -- where she</p> <p>20 brought the top of the drink in order to determine</p> <p>21 what you thought was a two or three ounce -- two</p> <p>22 or -- a double or a triple drink, correct?</p> <p>23 A. Based on what I -- sitting here, no.</p> <p>24 Q. Okay.</p>	<p style="text-align: right;">Page 118</p> <p>1 it is? Or what the server said she put into the</p> <p>2 drink?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. I'm basing it on the bartender saying that she</p> <p>5 pours no more than a quarter of an ounce from the</p> <p>6 top, including the cherry. And to do that --</p> <p>7 MR. FARRAH: Quarter of an inch?</p> <p>8 THE WITNESS: I'm sorry, thank you.</p> <p>9 A. Quarter of an inch from the top. And to do that,</p> <p>10 you have to pour a good two and a half ounces</p> <p>11 worth of booze, of JD with some vermouth in there.</p> <p>12 So I'm basing it on the water melt, and</p> <p>13 to get to that level of the drink -- it's more</p> <p>14 than what the recipe calls for, is what I'm basing</p> <p>15 it. What the exact amount is, I don't know. I</p> <p>16 wasn't there.</p> <p>17 I do know that she did not measure it,</p> <p>18 she free poured, and I know -- that's all I know.</p> <p>19 Q. Okay. Is there a particular reason why you give</p> <p>20 more credence to the quarter of an inch from the</p> <p>21 top of the glass, than her testimony as to exactly</p> <p>22 what she puts into the drink?</p> <p>23 A. Yes.</p> <p>24 Q. Why's that?</p>
<p style="text-align: right;">Page 116</p> <p>1 A. I wasn't there.</p> <p>2 Q. Now, do you know what the Longhorn recipe is for</p> <p>3 alcohol in a drink -- in a Manhattan?</p> <p>4 A. I believe I read that it was a two ounce -- two</p> <p>5 ounces of Jack Daniels and a quarter of an ounce</p> <p>6 of vermouth.</p> <p>7 Q. And do you consider that -- how many drinks do you</p> <p>8 consider that to be?</p> <p>9 A. Close to two pharmacologically.</p> <p>10 Q. How close to two?</p> <p>11 A. I think Jack Daniels is 80 proof, and roughly an</p> <p>12 ounce and a quarter of 80 proof is equal to one</p> <p>13 ounce of 100 proof spirits, so two and a half</p> <p>14 ounces worth of booze would be two drinks in one</p> <p>15 glass.</p> <p>16 Vermouth is lower proof, so it's closer</p> <p>17 to two than it is to one drink pharmacologically.</p> <p>18 I can say that.</p> <p>19 Q. It's not two drinks, though, correct?</p> <p>20 A. It's --</p> <p>21 MR. FARRAH: Objection.</p> <p>22 A. Clearly it's not two drinks, per se.</p> <p>23 Q. Okay. Two ounces of 80 proof liquor would be</p> <p>24 .08 -- would be .8 ounces of pure ethanol,</p>	<p style="text-align: right;">Page 119</p> <p>1 A. Because you can't pour an ounce and a half of Jack</p> <p>2 Daniels with a quarter of an ounce of vermouth and</p> <p>3 get it to be that level. It won't come to that</p> <p>4 level.</p> <p>5 Q. Assuming she testified that that's the level she</p> <p>6 brought it to every time she poured it, correct?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. I'm sorry?</p> <p>9 Q. Well, if she testified that she brings it to an</p> <p>10 inch from the top, she could do that with less</p> <p>11 than two ounces of bourbon and a quarter ounce of</p> <p>12 vermouth, correct?</p> <p>13 A. No.</p> <p>14 Q. Okay.</p> <p>15 A. Roughly -- it would take -- if you poured two</p> <p>16 ounces worth of Jack, based on the recipe, and a</p> <p>17 quarter of an ounce of vermouth and chilled it, it</p> <p>18 would be about three-quarters of an inch from the</p> <p>19 top, strained into the glass.</p> <p>20 Q. How many ounces would that be in total?</p> <p>21 MR. FARRAH: I'm sorry, how many ounces</p> <p>22 of what would that be in total?</p> <p>23 MR. GILLIS: Liquid.</p> <p>24 A. If you poured two ounces worth of Jack Daniels and</p>
<p style="text-align: right;">Page 117</p> <p>1 correct?</p> <p>2 A. It would be a half an ounce shy of two drinks</p> <p>3 pharmacologically, I'll go that route.</p> <p>4 Q. Okay. And the vermouth would add a little bit,</p> <p>5 but not much, correct?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. Yes.</p> <p>8 Q. Because you're only adding a quarter ounce of a</p> <p>9 very low percentage of alcohol, correct?</p> <p>10 MR. FARRAH: Objection.</p> <p>11 A. Overall, correct.</p> <p>12 Q. So this isn't a double or a triple drink, correct?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. It's more like a double, if it's made according to</p> <p>15 recipe.</p> <p>16 Q. If it's made to the recipe, it's less than a</p> <p>17 double, correct?</p> <p>18 A. Actually, if I remember correctly, Bar Code and</p> <p>19 the Rare manuals both say -- lean towards a double</p> <p>20 for those two drinks; for that type of drink, a</p> <p>21 martini and a Manhattan.</p> <p>22 Q. For purposes of your opinion in this case, what</p> <p>23 are you basing the drink on? What the Bar Code</p> <p>24 says a Manhattan is? What Longhorn's recipe says</p>	<p style="text-align: right;">Page 120</p> <p>1 a quarter of an ounce of vermouth over ice and</p> <p>2 chilled it and poured it into an up glass, it</p> <p>3 would come about three-quarters of an</p> <p>4 ounce -- three-quarters of an inch from the top.</p> <p>5 Q. And how many ounces in liquid would that be?</p> <p>6 A. Approximately? Probably close to three. A little</p> <p>7 under three.</p> <p>8 Q. And what do you base that on?</p> <p>9 A. On experience and practice.</p> <p>10 Q. Well, your experience that you testified</p> <p>11 previously under oath is that two and a half</p> <p>12 ounces of 80 proof vodka melted over ice would be</p> <p>13 three and a half ounces of liquid in the glass,</p> <p>14 correct?</p> <p>15 A. What I said is if you -- if you used a four and a</p> <p>16 half ounce up glass and you poured two and a half</p> <p>17 ounces worth of 80 proof booze over ice, with the</p> <p>18 water melt and a quarter of an ounce of vermouth</p> <p>19 and the fruit, it would bring it up to that level</p> <p>20 of roughly quarter of an inch from the top.</p> <p>21 Q. Which is three and a half ounces?</p> <p>22 MR. FARRAH: I'm sorry, he hadn't</p> <p>23 finished, so I don't know what you're --</p> <p>24 Q. Go ahead?</p>

<p style="text-align: right;">Page 121</p> <p>1 A. It would be roughly about three and a half ounces 2 worth of fluid. 3 Q. So if that's three and a half ounces of fluid, why 4 is it in this situation it's only three ounces 5 with the ice melt? 6 A. Because I don't think she let it sit long enough 7 in the martini glass to get enough water melt 8 there. 9 Q. Based on what evidence? 10 A. On her evidence that she just strained 11 them -- poured it into the glass, strained it, and 12 did another one, strained it, did another one, 13 strained it, as opposed to stirring it around and 14 getting a nice mist on the outside of the glass, 15 which I think the recipe calls for. 16 Q. You think the recipe calls for it to sit and get a 17 mist? 18 A. Uh-huh, so the outside of the mixing glass is kind 19 of foggy, if you will, or you could see the ice or 20 the cold. 21 Q. So your testimony is that you read in the 22 deposition that she didn't let them sit? 23 MR. FARRAH: Objection. 24 A. That's what I -- that's how I gleaned the</p>	<p style="text-align: right;">Page 124</p> <p>1 inches, I'm sorry. I'm getting confused now. No, 2 three-quarters of -- I'm sorry. 3 If I do a two ounce pour over ice with a 4 quarter of an ounce of water melt -- 5 Q. Quarter of an ounce of vermouth. 6 A. Vermouth, thank you. Then I might get three 7 ounces worth of fluid if it sat long enough for it 8 to get the outside chill on the glass. 9 Q. So you think it would be a full half ounce 10 difference than preparing a two and a half ounce 11 martini the same way? 12 MR. FARRAH: Objection. 13 A. Two and a half ounce martini, as in two and a half 14 ounces worth of vodka? I'm not -- 15 Q. You previously testified that two and a half 16 ounces of 80 proof vodka chilled over ice with the 17 water pour off would fill up approximately three 18 and a half ounces in a glass? Whether it's a four 19 and a half glass or six ounce glass, it doesn't 20 matter, it would be three and a half ounces, 21 correct? 22 A. With a quarter of an ounce of vermouth and the 23 fruit is what I meant in that circumstance when we 24 talked about the martini earlier.</p>
<p style="text-align: right;">Page 122</p> <p>1 information. That's how I read her information. 2 Q. Okay. But had she let it sit, you would have 3 expected it to be at least three and a half 4 ounces, correct? 5 MR. FARRAH: Objection. 6 A. Maybe a little less, but somewhere in that 7 vicinity. 8 Q. Okay. And three and a half ounces of liquid in 9 that glass would come how far from the top of the 10 glass? 11 MR. FARRAH: Which glass are we talking 12 about? 13 A. Six ounce up glass. 14 Q. Up glass? 15 A. Might be two ounces or an ounce, I don't know. I 16 haven't -- I don't know that specific measurement 17 based on what it looks like in that glass. I 18 didn't do that specific three and a half ounces 19 worth of fluid in a glass to see where it would 20 go. 21 Q. Okay. So assuming that the menu were properly 22 followed so that it sat, was strained, it would 23 come out around three and a half ounces, you don't 24 have an opinion as to where in the glass that</p>	<p style="text-align: right;">Page 125</p> <p>1 Q. Well, that's not what your writings say, correct? 2 They don't even mention vermouth, correct? 3 A. If it was a martini, vermouth is part of a 4 martini. 5 Q. Not a dry martini. 6 A. No. 7 Q. Okay. You've written that two and a half ounces 8 of a martini, eight and a half ounces -- excuse 9 me, strike that. 10 Two and a half ounce of 80 proof vodka 11 over ice create an ounce of water melt to give the 12 customer the three and one half ounces of fluid 13 necessary to make the glass look full. 14 Do you remember -- 15 A. That's if it's a four or four and a half ounce up 16 glass with fruit, right. That's what I meant by 17 that in writing that chapter. 18 Q. But two and a half ounces of just vodka gives 19 the -- creates three and a half ounces of liquid 20 once strained over ice, correct? 21 A. At the most you'd get an ounce of water melt, 22 correct. 23 Q. Well, you don't say in your writings at the most. 24 You just say that's what it creates, right?</p>
<p style="text-align: right;">Page 123</p> <p>1 would go? 2 A. Not in this particular circumstance, no. And 3 that's if it's a two and a half ounce pour with a 4 quarter of an ounce. We're talking about the 5 martini. I think we're getting confused here. 6 Not the two ounce pour. 7 Q. Well, two and a quarter. Two ounces of -- 8 A. Well, what I said before -- 9 Q. Two ounces of bourbon and a quarter ounce of 10 vermouth, correct? 11 A. Two ounces of bourbon and a quarter ounce of 12 vermouth is what the recipe calls for. 13 Q. And if properly situated -- left to sit and then 14 strained, where -- how far from the top of the six 15 ounce up glass in inches would you expect that 16 amount of liquid to come? 17 MR. FARRAH: Didn't you ask him that 18 already? 19 MR. GILLIS: No. 20 MR. FARRAH: Objection. I think you did. 21 A. I would say if they let it sit for a while, where 22 enough water melt could be there, it would 23 probably come around two ounces from the top, 24 maybe two and a half ounces. Two and a half</p>	<p style="text-align: right;">Page 126</p> <p>1 A. Correct. 2 MR. FARRAH: Let me see this. 3 Q. And so why would the Longhorn recipe for the 4 Manhattan, Jack Daniels Manhattan in this case, be 5 a half an ounce less than this recipe? 6 MR. FARRAH: Objection. 7 A. Because I don't believe it was strained to the 8 level of that -- of most of the martinis would 9 be -- 10 Q. Okay. Assuming -- 11 A. -- to allow the water to become part of that 12 drink. I'm sorry. 13 Q. Assuming it was properly strained, would you 14 expect it to be at the same level, that being 15 three and a half ounces? 16 MR. FARRAH: Objection. 17 A. Because it's a little -- it would be a quarter of 18 an ounce less. It would be a little bit less, but 19 it would be close to the ballpark. 20 Q. Three and a quarter? 21 A. Yes. 22 Q. Okay. 23 MR. FARRAH: Can we take -- can we eat? 24 MR. GILLIS: Just give me five more</p>

<p style="text-align: right;">Page 127</p> <p>1 minutes.</p> <p>2 MR. FARRAH: Okay. Let's make it five</p> <p>3 more minutes. I'm starving.</p> <p>4 Q. Now, in the six ounce up glass how far from the</p> <p>5 rim would three and a quarter ounces be?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. I don't know in inches. I would say it would be</p> <p>8 close to three-quarters -- three-quarters of the</p> <p>9 way down the glass. Maybe close to half.</p> <p>10 I'd say less than half, but more like</p> <p>11 three-quarters, somewhere in that vicinity.</p> <p>12 Q. Okay. So three and a half ounce -- three and a</p> <p>13 quarter ounces would fill the six ounce up glass</p> <p>14 to the halfway up the glass or less, correct?</p> <p>15 A. Yes, somewhere in that --</p> <p>16 MR. FARRAH: Objection. There's no</p> <p>17 such -- he's talking inches. Objection.</p> <p>18 Q. Correct?</p> <p>19 A. Roughly three-quarters of an inch from the top, is</p> <p>20 what I meant to say.</p> <p>21 Q. Okay. Let's make sure we're all on the same page.</p> <p>22 You believe that three and a quarter</p> <p>23 ounces in a six ounce up rock glass would bring</p> <p>24 the level of the drink to approximately</p>	<p style="text-align: right;">Page 130</p> <p>1 drink order at 8:51 that evening, first drink</p> <p>2 order at the table, that he was in the red zone?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. No.</p> <p>5 Q. Okay. No, he wasn't in the red zone, or no, you</p> <p>6 don't have an opinion?</p> <p>7 A. No, he wasn't in the red zone.</p> <p>8 Q. Okay. Where would you put him?</p> <p>9 A. From the evidence that I -- yellow zone.</p> <p>10 Q. And what do you base him being in the yellow zone</p> <p>11 on?</p> <p>12 A. On the fact that he had already four</p> <p>13 pharmacological drinks at the bar, and he was</p> <p>14 drinking rather quickly.</p> <p>15 Q. Okay. And quickly to you is two 25 ounce beers</p> <p>16 over a 50 minute period?</p> <p>17 A. Within a 50 minute period, yes.</p> <p>18 Q. Okay. And I believe you said earlier that using</p> <p>19 one drink as either 12 ounce -- one drink is 12</p> <p>20 ounces of beer, correct? That's what you count as</p> <p>21 a beer?</p> <p>22 A. Five ounces of wine and one ounce of 100 proof</p> <p>23 spirits, yes.</p> <p>24 Q. But we're just dealing with beer right now --</p>
<p style="text-align: right;">Page 128</p> <p>1 three-quarters of an inch from the top of the rim?</p> <p>2 A. The lip.</p> <p>3 Q. And are you measuring the three-quarters on the</p> <p>4 side of the glass or straight up to the top?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. From the lip down, I would assume.</p> <p>7 Q. And if you did it straight up, it would be even</p> <p>8 less, correct?</p> <p>9 MR. FARRAH: Objection.</p> <p>10 A. I imagine, but I'm not a math wizard.</p> <p>11 MR. GILLIS: Why don't we just go break</p> <p>12 now.</p> <p>13 MR. FARRAH: Frame that question the way</p> <p>14 you want to after I've put something in my</p> <p>15 stomach.</p> <p>16 (Lunch break was taken.)</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 131</p> <p>1 A. Uh-huh</p> <p>2 Q. -- so we can agree that the 25 ounces was two</p> <p>3 drinks, correct?</p> <p>4 A. Yes.</p> <p>5 Q. So he had the equivalent of four drinks in 50</p> <p>6 minutes, correct?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. Yes.</p> <p>9 Q. And you testified earlier that you'd expect</p> <p>10 someone of his height and weight to be at a .01</p> <p>11 when he had six drinks in an hour, correct?</p> <p>12 MR. FARRAH: Objection.</p> <p>13 A. What I said is a 200 pound man, according to a</p> <p>14 chart I've seen before, has six drinks in an hour,</p> <p>15 his BAC is .10, not .01.</p> <p>16 Q. I'm sorry, .10.</p> <p>17 A. .10.</p> <p>18 Q. And you would expect -- and it's your</p> <p>19 understanding that a burnoff rate for someone like</p> <p>20 Mr. Southworth would be approximately .02 per</p> <p>21 hour, correct?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. No, I'm not a toxicologist, so I can't tell you</p> <p>24 the exact burnoff rate of an individual's burnoff.</p>
<p style="text-align: right;">Page 129</p> <p>1 AFTERNOON SESSION</p> <p>2</p> <p>3 CONTINUED EXAMINATION BY MR. GILLIS:</p> <p>4 Q. You have in front of you a document that you've</p> <p>5 been referring to that on first the page says it's</p> <p>6 the audit report, correct?</p> <p>7 A. I'm sorry, I didn't hear your last --</p> <p>8 Q. It says audit report at the top of --</p> <p>9 A. Yes, it does.</p> <p>10 Q. And that's your understanding of the bill which</p> <p>11 shows the drinks and food served to the Southworth</p> <p>12 table on September 26th, 2003, correct?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. Yes.</p> <p>15 MR. GILLIS: Could we have that marked as</p> <p>16 Exhibit 7.</p> <p>17 (Exhibit No. 7, audit report, marked for</p> <p>18 identification.)</p> <p>19 Q. Do you have an opinion, at the time that</p> <p>20 Mr. Southworth was served the Manhattan at 8:51,</p> <p>21 what his blood alcohol was at that point?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. No.</p> <p>24 Q. Is it your opinion that when he got his first</p>	<p style="text-align: right;">Page 132</p> <p>1 I know that when we teach the TIPS</p> <p>2 program, we say that the liver eliminates less</p> <p>3 than one ounce of pure alcohol per hour. But I've</p> <p>4 seen toxicologists in court testimony say less</p> <p>5 than .02. I've seen people say .015, .010. So</p> <p>6 I'm not a toxicologist and can't speak --</p> <p>7 Q. Well, based on your experience and training in</p> <p>8 this field, what would you expect -- if he had</p> <p>9 four drinks in 50 minutes, how much of that would</p> <p>10 have been burnt off by the time he sat down and</p> <p>11 ordered his first drink at 8:51?</p> <p>12 MR. FARRAH: Objection.</p> <p>13 A. Almost a one 12 ounce beer.</p> <p>14 Q. So at the time he was ordering the Manhattan at</p> <p>15 8:51, he had the equivalent in him still of three</p> <p>16 12 ounce beers, is that fair to say?</p> <p>17 MR. FARRAH: Objection.</p> <p>18 A. If we -- we also have to take into account that he</p> <p>19 had a beer prior to his arrival there, too.</p> <p>20 Q. Okay. And that was at 7 o'clock?</p> <p>21 A. Somewhere in that vicinity, after they finished</p> <p>22 dirt biking.</p> <p>23 Q. And that had burnt off before he even got to the</p> <p>24 restaurant, correct?</p>

<p style="text-align: right;">Page 133</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. If in fact he had it at 7 o'clock, sure.</p> <p>3 Q. Well, what's your understanding as to when he had</p> <p>4 it?</p> <p>5 A. I would say to you yes. I mean, one beer, an hour</p> <p>6 roughly. Roughly a 12 ounce beer.</p> <p>7 Q. So for all intents and purposes, that's a</p> <p>8 nonfactor when he gets to the restaurant, because</p> <p>9 it would have burnt off by 8 o'clock, correct?</p> <p>10 A. If everything's the way -- the testimony is right,</p> <p>11 yes.</p> <p>12 Q. Well, you tell me. You read the testimony.</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. Yes, from what I read, he only had one beer.</p> <p>15 Q. At what time?</p> <p>16 A. I'm not sure of the exact time. It was after dirt</p> <p>17 biking, so it could have been around that</p> <p>18 7 o'clock when it would start to get dark.</p> <p>19 Q. So whatever dusk is, that's when he had it,</p> <p>20 correct? Is that your memory of the testimony?</p> <p>21 A. I think it was that.</p> <p>22 Q. Okay.</p> <p>23 A. Because I think they said it took about a half an</p> <p>24 hour to go from Templeton to --</p>	<p style="text-align: right;">Page 136</p> <p>1 that he would -- had just come off of a decent</p> <p>2 workout would worry me.</p> <p>3 Q. Okay. By 8:50 -- strike that.</p> <p>4 Would you have not served him a Manhattan</p> <p>5 at 8:51 on September 26th, 2003?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. I would have looked long and hard at all the</p> <p>8 issues, and probably been a little bit concerned.</p> <p>9 I don't know that I would or wouldn't. I would</p> <p>10 have to be there.</p> <p>11 Q. Well, you're an expert here on responsible</p> <p>12 service. Do you think it would be responsible for</p> <p>13 Miss Chabot to serve him a Manhattan at 8:51 on</p> <p>14 that evening, based on all the facts in the case</p> <p>15 that you've reviewed and rendered professional</p> <p>16 opinions upon?</p> <p>17 MR. FARRAH: Objection.</p> <p>18 A. I would be concerned about it, because it's three</p> <p>19 drinks in one glass. I may not do it. If I did</p> <p>20 do it, I might be ready to take it back from him.</p> <p>21 Again, I wasn't there, I don't know what</p> <p>22 he -- what cues he gave me -- gave at that point</p> <p>23 in time. And the fact is, I'm giving him three</p> <p>24 drinks in one glass. That's what worries me.</p>
<p style="text-align: right;">Page 134</p> <p>1 Q. Littleton?</p> <p>2 MR. FARRAH: Leominster.</p> <p>3 A. From Templeton to Leominster I think is what they</p> <p>4 said.</p> <p>5 Q. And if he -- if six drinks gets him to a .01,</p> <p>6 that's about .016 per drink, correct?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. .10, you mean?</p> <p>9 Q. .10, I'm sorry.</p> <p>10 MR. FARRAH: Objection.</p> <p>11 A. If the math adds appropriately. Again, I told you</p> <p>12 I'm not a math whiz.</p> <p>13 Q. But if we were to take .1 and divide it by six</p> <p>14 drinks --</p> <p>15 A. He's doing that now.</p> <p>16 Q. -- and then we were to multiply that by three</p> <p>17 beers, that would be the approximate blood alcohol</p> <p>18 you would expect him to be at 8:51, correct?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. Perhaps. Again, I'm not a toxicologist. I don't</p> <p>21 purport to be.</p> <p>22 Q. You're not a toxicologist, we know that, correct?</p> <p>23 A. Yes.</p> <p>24 Q. And you don't expect the servers to be</p>	<p style="text-align: right;">Page 137</p> <p>1 Q. Okay. The fact that she served him a drink --</p> <p>2 well, let's change it. If she served him a 12</p> <p>3 ounce beer at that point, you would have had a</p> <p>4 problem with that?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. As long as he's starting to eat now, maybe I</p> <p>7 wouldn't, maybe I would. Again, it all depends on</p> <p>8 what visual cues I would have from him as well.</p> <p>9 Q. Okay. What were the visible cues that she had of</p> <p>10 Mr. Southworth at 8:51 p.m. when she took the</p> <p>11 drink order for a Manhattan?</p> <p>12 A. I don't think there was ever any evidence in the</p> <p>13 depositions to indicate that.</p> <p>14 Q. Okay.</p> <p>15 A. In fact, she thought they were all fine throughout</p> <p>16 the night.</p> <p>17 Q. And do you have any reason to disbelieve that</p> <p>18 testimony?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. That they were all fine? Yes. Michael Espy said</p> <p>21 he was drunk when he got there.</p> <p>22 Q. Do you have any reason to believe that</p> <p>23 Mr. Southworth exhibited any signs that evening,</p> <p>24 while at the table before he was served his last</p>
<p style="text-align: right;">Page 135</p> <p>1 toxicologists either, correct?</p> <p>2 A. I don't expect them to be a toxicologist, no.</p> <p>3 Q. But you expect them, as part of your training, to</p> <p>4 have some semblance of the approximate amount of</p> <p>5 alcohol in a drink so that they can help gauge</p> <p>6 what zone the various customers are in, correct?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. And one way to do that is to have an</p> <p>9 approximation as to what the person's blood</p> <p>10 alcohol is, even if you're not a toxicologist,</p> <p>11 correct?</p> <p>12 A. Certainly.</p> <p>13 Q. Okay. So what -- if he had the equivalent of four</p> <p>14 beers in 50 minutes, and during that time period</p> <p>15 he would have burnt off approximately one beer,</p> <p>16 what would you expect the ballpark blood alcohol</p> <p>17 to be for Mr. Southworth at 8:51 when he ordered</p> <p>18 the Manhattan?</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. Could have been somewhere over .05 to .075,</p> <p>21 somewhere in that vicinity.</p> <p>22 Q. Okay. And for you, in your determination, that</p> <p>23 would put him in the yellow zone on this evening?</p> <p>24 A. The speed in which he drank those drinks, the fact</p>	<p style="text-align: right;">Page 138</p> <p>1 drink, that showed that he wasn't fine?</p> <p>2 MR. FARRAH: Objection.</p> <p>3 A. I don't have any evidence to indicate that.</p> <p>4 Q. Okay. And if I have -- I don't want to</p> <p>5 paraphrase, you tell me, but you can't opine one</p> <p>6 way or the other whether or not it was appropriate</p> <p>7 to serve him that Manhattan at 8:51, correct?</p> <p>8 MR. FARRAH: Objection. Which -- are you</p> <p>9 talking --</p> <p>10 MR. GILLIS: Mr. Southworth at 8:51.</p> <p>11 MR. FARRAH: He's talking about the</p> <p>12 Manhattan he views as three drinks.</p> <p>13 MR. GILLIS: Correct.</p> <p>14 MR. FARRAH: Okay.</p> <p>15 A. All I can say is I would be concerned about doing</p> <p>16 it. I have no trouble with the 12 ounce beer, and</p> <p>17 I'd watch to make sure he ate, but giving him</p> <p>18 three drinks at that point in time would worry me.</p> <p>19 Q. Okay. But would you not serve him?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. I can't say that from where I'm seated.</p> <p>22 Q. Okay. So you can't say whether you would or would</p> <p>23 not have served him at 8:51 that Manhattan,</p> <p>24 correct?</p>

<p style="text-align: right;">Page 139</p> <p>1 A. Correct.</p> <p>2 Q. Okay. Now, you keep calling this a triple drink,</p> <p>3 correct?</p> <p>4 A. Two to three drinks is what I keep saying.</p> <p>5 Q. Okay. But you've already admitted that the</p> <p>6 Longhorn recipe computes out to less than one</p> <p>7 ounce of pure alcohol, correct?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 A. It would probably be right around that one ounce</p> <p>10 of pure alcohol, because it's a two ounce pour of</p> <p>11 80 proof, plus the quarter ounce of vermouth. So</p> <p>12 it's closer to one ounce than it is a half an</p> <p>13 ounce.</p> <p>14 Q. Okay. Two ounces of 80 proof is .8 ounces of pure</p> <p>15 alcohol, correct?</p> <p>16 A. I imagine, if you did the math. I didn't do it.</p> <p>17 Q. Well, you tell me. You're the expert.</p> <p>18 A. I told you I'm not a math expert.</p> <p>19 Q. You can't compute the amount of alcohol in two</p> <p>20 ounces of bourbon; pure alcohol?</p> <p>21 A. Well, I would say an ounce and a quarter of 80</p> <p>22 proof is equal to one ounce of 100 proof spirits,</p> <p>23 five ounces of wine, and 12 ounces of beer. So if</p> <p>24 I had to sit down and compute it with a</p>	<p style="text-align: right;">Page 142</p> <p>1 drinking shots -- they were drinking Jack Daniels</p> <p>2 and beers at the hotel before they got there, then</p> <p>3 yes, I would have a problem.</p> <p>4 Q. Okay. Were they drinking Jack Daniels and beer</p> <p>5 after they leave the Longhorn?</p> <p>6 MR. FARRAH: After they left the</p> <p>7 Longhorn?</p> <p>8 MR. GILLIS: Yes.</p> <p>9 MR. FARRAH: Objection.</p> <p>10 A. I don't recall. They may have when they went back</p> <p>11 to the hotel room.</p> <p>12 Q. Okay. As to Mr. Southworth, what evidence was</p> <p>13 there that prior to that last round, when</p> <p>14 Miss O'Donnell talked to the manager, that there</p> <p>15 was any concern of serving him the Manhattan at</p> <p>16 that time?</p> <p>17 MR. FARRAH: Objection. Whose concern?</p> <p>18 A. Other than the fact that they --</p> <p>19 THE WITNESS: I'm sorry.</p> <p>20 MR. GILLIS: Miss O'Donnell.</p> <p>21 A. Other than the fact that they were loud, and that</p> <p>22 she was serving Manhattans to the table, and she</p> <p>23 probably knew that they were stronger than normal</p> <p>24 drinks.</p>
<p style="text-align: right;">Page 140</p> <p>1 calculator, maybe I could. But it's still a good</p> <p>2 two -- close to two drinks in one glass, and maybe</p> <p>3 three.</p> <p>4 Q. Okay. Would you disagree with Dr. Benjamin saying</p> <p>5 it's .84 ounces of pure alcohol?</p> <p>6 A. I would not disagree with Dr. Benjamin.</p> <p>7 MR. FARRAH: That's the Rare recipe?</p> <p>8 MR. GILLIS: Rare recipe, correct.</p> <p>9 Q. So the amount of alcohol pursuant to the recipe is</p> <p>10 less than two drinks, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And you keep calling it a double to a</p> <p>13 triple drink, correct?</p> <p>14 A. Yes.</p> <p>15 Q. What evidence do you have that that drink that</p> <p>16 evening was poured in excess of the recipe?</p> <p>17 MR. FARRAH: Other than what he's</p> <p>18 testified to already?</p> <p>19 MR. GILLIS: Yes.</p> <p>20 A. There's nothing else I can say other than what I</p> <p>21 testified to already.</p> <p>22 Q. You remember her testimony that she poured it to</p> <p>23 one inch from the top before she put in the</p> <p>24 cherry, correct?</p>	<p style="text-align: right;">Page 143</p> <p>1 Q. She, being the bartender?</p> <p>2 A. That's who you're talking about, Kristin</p> <p>3 O'Donnell, right?</p> <p>4 Q. Okay. What evidence do you have, if any, that</p> <p>5 they were loud before they were served their last</p> <p>6 drink at the Longhorn that night?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. I don't have any specific -- I don't know the</p> <p>9 exact time of when they were served, compared to</p> <p>10 when the concern was. I really don't know.</p> <p>11 Q. In fact, there's absolutely no evidence that they</p> <p>12 were loud prior to serving their last drink, isn't</p> <p>13 that true?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. Not that I've read.</p> <p>16 Q. Okay. You read Jude Connolly's deposition, when</p> <p>17 he said it was around 10:30, correct?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. I believe so.</p> <p>20 Q. Okay. And you know that the bill was paid at</p> <p>21 9:51, correct?</p> <p>22 MR. FARRAH: 7.</p> <p>23 Q. 9:57, correct?</p> <p>24 A. Yes.</p>
<p style="text-align: right;">Page 141</p> <p>1 A. I think she said that. Again, you didn't show me</p> <p>2 in the deposition, but you've told me that that's</p> <p>3 what she's testified to.</p> <p>4 Q. Well, don't you think that's important for your</p> <p>5 report as to where the server said she poured the</p> <p>6 alcohol that evening?</p> <p>7 A. I don't take much credence what the server said.</p> <p>8 What I do to take credence in is the server was</p> <p>9 concerned enough to call the manager and server</p> <p>10 about the Manhattans that were being served at</p> <p>11 that table, and nothing was done about it.</p> <p>12 That's about the only thing I really have</p> <p>13 credence in her testimony.</p> <p>14 Q. Okay. The server -- the manager was not contacted</p> <p>15 until the last round, correct?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. From what I heard.</p> <p>18 Q. Nobody had a problem with the round at 8:51 that</p> <p>19 you're aware of, correct?</p> <p>20 A. Not that I'm aware of.</p> <p>21 Q. Okay. Do you have any criticism of that round?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. If Michael Espy's testimony is correct, and he was</p> <p>24 intoxicated when he got there, because they were</p>	<p style="text-align: right;">Page 144</p> <p>1 Q. Okay. So the loudness was 33 minutes after the</p> <p>2 bill was paid, correct?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. I thought the issue of the loudness was when</p> <p>5 it -- in and around the last round was served.</p> <p>6 Q. Based on what testimony?</p> <p>7 A. I think it was Kristen's. And she said that as</p> <p>8 long as they're eating, I guess it's okay.</p> <p>9 Because she touched base -- she talked with Leigh,</p> <p>10 and she talked with the manager. She said she</p> <p>11 talked to both of them.</p> <p>12 Q. Okay.</p> <p>13 A. And I don't think she talked to them separately,</p> <p>14 but I'm not sure.</p> <p>15 Q. So your understanding of the facts is that the</p> <p>16 bartender could hear them being loud, and was</p> <p>17 concerned about that?</p> <p>18 A. It seems that way from what I read. It's</p> <p>19 possible. Or it could have been just the number</p> <p>20 of drinks going to the table.</p> <p>21 Q. And that's the basis of your opinion, is that she</p> <p>22 could tell that they were loud before they got</p> <p>23 their last drink?</p> <p>24 MR. FARRAH: Objection.</p>

<p style="text-align: right;">Page 145</p> <p>1 A. I'm not sure. Like I said, it's possible. It 2 seemed like it was in that time frame that 3 the -- when the drinks were served. Or they had 4 been served that that issue was brought up to 5 management and Leigh. From what I read. 6 Q. Okay. From what you read, Leigh -- Kristen was 7 the one who brought it up with management of their 8 being loud? 9 A. Kristen said she did speak to the manager, and she 10 did speak to Leigh. And Jude did say that they 11 did come over and make mention of the fact that 12 they were being loud, from what I recall. 13 Q. From what you recall? 14 A. From what I recall, yes. 15 Q. And that's something that you'd remember, because 16 that's important to your opinion, isn't it? 17 A. Certainly. 18 Q. Let's get back to that question. How do you 19 compute that to be three drinks in the glass? 20 A. I said two to three drinks, because it would take 21 that much to get it up to that level of a quarter 22 of an inch from the top, with the maraschino 23 cherry. 24 Q. You did the experiment that has been labeled</p>	<p style="text-align: right;">Page 148</p> <p>1 according to your prior testimony, an ounce of 2 meltoff, correct? 3 MR. FARRAH: Objection. 4 A. If it's chilled with the -- just about. 5 Q. Right. 6 A. I mean, again, I didn't use Exacto. It's been 7 from experience, but it's close to. 8 Q. Okay. So we know one drink brings it to three and 9 a quarter to three and a half, correct? 10 MR. FARRAH: Objection. One drink brings 11 two and a quarter to three and a quarter, three 12 and a half? 13 Q. Three and a quarter to three and a half ounces of 14 fluid in the glass, correct? 15 MR. FARRAH: Objection. 16 A. If it's an ounce and a -- if it's two and a 17 half -- I'm sorry. 18 If it's two and a quarter ounces worth of 19 booze, based on the Longhorn recipe, and you chill 20 it, you could get three. If you chilled it to the 21 point where it sat in the ice for a bit, you could 22 get three and a quarter ounces worth of fluid. 23 Q. Okay. 24 A. It may be less. I mean, the way we did it, it to</p>
<p style="text-align: right;">Page 146</p> <p>1 Exhibits 1 and 2 in this case, correct? 2 A. Yes, I participated in -- 3 Q. Okay. And using the Longhorn recipe, two drinks 4 was well above a quarter inch from the top, 5 correct? 6 A. Right to the top of the glass. 7 Q. Okay. It was well above the quarter of an inch 8 from the top, correct? 9 A. Yes. And we backed -- 10 MR. FARRAH: Objection to the form. 11 THE WITNESS: I'm sorry. 12 MR. FARRAH: Don't be sorry, it's just I 13 should have objected the first time. 14 A. It was at the top of the glass. And then what we 15 did is we backed off to a quarter of an inch from 16 the top, and we found that that was in fact an 17 ounce of fluid. 18 Q. So you made two drinks of two ounces of bourbon 19 and a quarter ounce of vermouth, correct? 20 A. In each one, right. 21 Q. Okay. So that's a combined four ounces of bourbon 22 and a half ounce of vermouth, correct? 23 A. Yes. 24 Q. And you found that four and a half ounces --</p>	<p style="text-align: right;">Page 149</p> <p>1 would probably be less, because it 2 was (gesturing.) 3 Q. Well, assuming that that's what the facts say 4 happened, correct? 5 MR. FARRAH: Assuming what? 6 Q. There's no testimony whatsoever -- strike that. 7 The question was never asked in the 8 deposition as to how long she let it sit before 9 she strained it, correct? 10 A. That wasn't, no, it wasn't. 11 Q. Okay. So you don't know that, correct? 12 MR. FARRAH: Objection. 13 A. That's the missing link. 14 Q. Okay. And that's very important to you in 15 determining the strength of that drink, correct? 16 MR. FARRAH: Objection. 17 A. It would be important to me as far as the water 18 melt as part of that drink, sure. 19 Q. Correct. And the water melt's important because 20 it determines for you whether it's one and a half 21 drinks, two drinks or three drinks, correct? 22 MR. FARRAH: Objection. 23 A. Yes. 24 Q. Okay. And assuming it was properly poured and</p>
<p style="text-align: right;">Page 147</p> <p>1 A. Chilled. 2 Q. -- chilled was six ounces of liquid in total, 3 correct? 4 MR. FARRAH: Objection. 5 A. Yes, right up to the very top of the glass. 6 Q. Okay. So if the drink were poured to a quarter of 7 an inch from the top, you would expect that drink 8 to be an ounce less than the two drinks combined, 9 correct? 10 A. That's correct. 11 Q. Okay. And a good portion of that ounce less would 12 be the alcohol, correct? 13 MR. FARRAH: Objection. 14 A. Yes. 15 Q. Okay. So what would -- what's your understanding 16 of what the most pure alcohol could have been in 17 that drink if it was poured to one quarter inch 18 from the top of the lip? 19 MR. FARRAH: Objection. 20 A. I would say it's close to three and three-quarters 21 to three and a half of pure -- of the alcohol 22 itself. Maybe four ounces of alcohol itself, with 23 an ounce of water melt. 24 Q. Well, one drink properly strained creates,</p>	<p style="text-align: right;">Page 150</p> <p>1 properly strained, your opinion is that there 2 would be one ounce of runoff along with the 3 alcohol in the drink that is called for by the 4 menu, correct? 5 MR. FARRAH: Objection. 6 A. Conceivably. 7 Q. Okay. So the most that five ounces would be would 8 be one and a half times what the menu calls for, 9 correct? 10 MR. FARRAH: Objection. 11 A. What did you say, 1.5 more? 12 Q. I'm saying that if one drink properly poured, 13 stirred, strained equals three and a quarter 14 ounces of liquid -- 15 A. Yes. 16 Q. -- five ounces would be approximately one and a 17 half times the menu proportions properly strained 18 and chilled, correct? 19 A. Con -- I would have to agree with that. 20 Q. Okay. So as far as whether it's two drinks, three 21 drinks or whatever, the most it could be is one 22 and a half times the menu -- what the menu drink 23 calls for, correct? 24 MR. FARRAH: Objection.</p>

<p style="text-align: right;">Page 151</p> <p>1 A. Conceivably. 2 Q. Okay. And we've agreed that the menu calls for 3 two ounces of bourbon and a quarter ounce of 4 vermouth, correct? 5 A. Yes. 6 Q. Okay. And that is .84 ounces of pure alcohol, 7 correct? 8 A. According to the toxicologist's testimony. 9 Q. Okay. So the most that that drink could be, based 10 on the evidence, would be one and a half times 11 that, correct? 12 MR. FARRAH: Objection. 13 A. I would imagine. 14 Q. So we're talking about 1.25 pure ounces of 15 alcohol, correct? 16 MR. FARRAH: Objection. 17 A. Okay. 18 Q. You agree? 19 A. I guess. 20 Q. Okay. And that's at the very most, correct? 21 MR. FARRAH: Objection. 22 A. I don't -- maybe. 23 Q. Okay. Did you measure how much liquid is in the 24 glass if it's filled, as Kristen O'Donnell</p>	<p style="text-align: right;">Page 154</p> <p>1 A. I thought it was ribs. 2 Q. Okay. Pretty full meal, right? 3 MR. FARRAH: Objection. 4 A. Yes. 5 Q. There was salads to the table, correct? 6 A. That's what I saw, yes. 7 Q. There was chowder to the table? 8 MR. FARRAH: Objection. 9 A. Yes. 10 Q. There was a Tonion to the table? 11 A. Yes. 12 Q. Do you know what a Tonion is? 13 A. I would guess it's like a blooming onion or a 14 fried onion. 15 Q. And fried fatty foods is good for people who are 16 drinking, correct? 17 A. If you eat before or during, sure. It helps slow 18 alcohol's rate of entry into the bloodstream. 19 Q. But you don't know when that came, before or after 20 the service of drinks, correct? 21 MR. FARRAH: What are we talking about, 22 the Tonion? 23 MR. GILLIS: The Tonion. 24 A. No, I don't.</p>
<p style="text-align: right;">Page 152</p> <p>1 testified to, to one inch from the lip? 2 A. I don't believe -- I don't believe we did. 3 Q. Okay. So you don't know how much alcohol would be 4 in the drink based on the proportions that she 5 said she poured, correct? 6 A. Right. 7 Q. Okay. Wouldn't that be important in determining 8 whether it was a double or a single drink? 9 MR. FARRAH: Objection. 10 A. I think it would be important if it was a double 11 or a triple drink, yes. 12 Q. Well -- 13 A. It's not a single drink. 14 Q. She testified that she put an ounce and a quarter 15 of bourbon with a quarter to a half ounce of 16 vermouth, strained it over ice, and it came to an 17 inch from the bottom of -- from the top of the 18 glass. Is that a double drink, in your opinion? 19 MR. FARRAH: Objection. 20 A. Not that one, no. 21 Q. Okay. That's a single? 22 A. What did you say, an ounce and a quarter of? 23 Q. 80 proof. 24 A. And then a quarter of an ounce of -- a little bit</p>	<p style="text-align: right;">Page 155</p> <p>1 Q. Okay. Certainly it was there before the drink at 2 9:21 if it was ordered at 8:40, correct? 3 A. I would hope so. 4 Q. So he's got Tonion, chowder, salad, ribs in him 5 when he gets that second Manhattan, correct? 6 MR. FARRAH: Objection. 7 A. I believe. I would think so. 8 Q. Okay. 9 A. But I didn't see anything where it says the food 10 went out. I don't know if that says that on this. 11 Q. I think it does. 12 A. Other items. Logout. Is that the logout there? 13 MR. FARRAH: Are you representing, by the 14 way, that there's something in the evidence that 15 he had chowder, Tonions -- 16 MR. GILLIS: I'm not answering your 17 questions, AI. If you want to ask him afterwards, 18 go right ahead. 19 MR. FARRAH: Okay. 20 Q. On the bottom of Page 5 of the audit report -- I'm 21 sorry, Page 8. 22 A. Is this the one we're looking at? 23 Q. Page 8, yes. 24 A. Okay.</p>
<p style="text-align: right;">Page 153</p> <p>1 more than a single. 2 Q. Okay. You wouldn't have any problem with serving 3 Mr. Southworth at 8:51 that ratio of alcohol in a 4 Manhattan, correct? 5 MR. FARRAH: Objection. 6 A. That ratio? 7 MR. FARRAH: Objection. 8 A. From what I've read, probably not. 9 Q. Okay. 10 A. But again, I would watch to see how fast he drank 11 it at that point, sure. 12 Q. And would you have any problems with him being 13 served another Manhattan at no earlier than 9:21, 14 30 minutes after that first one? 15 MR. FARRAH: Objection. 16 A. Again, that's where I'd be concerned. 17 This -- people don't drink Manhattans for the 18 flavor. Those are drinks that knock you on you 19 butt. And if it was that measurement, I'd still 20 be a little bit concerned. 21 But it depends on how much he ate, and 22 any cues, and so forth. 23 Q. Well, what's your understanding that he had to eat 24 that night?</p>	<p style="text-align: right;">Page 156</p> <p>1 Q. That's Page 9. But it goes on -- you're right. 2 Starting right here at 9 o'clock, and 3 going up here to the top of Page 9, and it's the 4 same table, Table 52, correct? 5 A. Yes, I believe so. 6 Q. And that's all the food that was ordered to the 7 table, correct? 8 MR. FARRAH: Objection. 9 A. I think the other stuff was ordered earlier. 10 Wasn't the chowder and the Tonion -- 11 Q. Right. 12 A. Yes. I think the appetizers went in before this. 13 Q. Right. So we had appetizers at 8:40, correct, 14 based on the first page? 15 MR. FARRAH: Objection. 16 A. Right. 17 Q. We had bread to the table right when they arrived, 18 correct? 19 A. I believe so. 20 Q. Okay. And we have food ordered, ribs, salads and 21 so forth, at 9 o'clock, correct? 22 A. Yes. 23 Q. And based on your training and experience and 24 prior experience in a restaurant, a business, you</p>

<p style="text-align: right;">Page 157</p> <p>1 understand that the salads and the appetizers come 2 out before the main meal, correct? 3 A. Yes. 4 Q. Okay. And so all of that came out before the ribs 5 would have come out some time after 9 o'clock, 6 correct? 7 A. Yes. 8 Q. And is it your understanding that she brought the 9 food to the table when she took that next order of 10 drinks, the ribs and so forth? 11 A. I don't know, but maybe. It's quite possible. 12 Q. Okay. But based on what you see here for food, 13 and based on what you reviewed in this case, would 14 you have not served him a second Manhattan at 9:21 15 that evening? 16 MR. FARRAH: Objection. 17 A. If it was two to three drinks in one glass, I 18 might be concerned about serving him at all. If 19 it's -- whatever -- we've been talking about two 20 different types of pours. So if you're talking 21 about the pours that Kristen's talking about, it's 22 possible. We don't -- I don't see anything that 23 tells me that those ribs came out before that 24 round of drinks was served, so I don't know what</p>	<p style="text-align: right;">Page 160</p> <p>1 only thing. 2 What time that actually happened, I 3 don't -- we -- I don't think we have an actual on 4 that. 5 Q. Okay. So you can't opine whether or not she 6 should have served him because of the way he 7 carried himself, because you don't know when he 8 wasn't carrying himself, wherever it was, the way 9 he was carrying himself, correct? 10 MR. FARRAH: Objection. 11 A. Right. 12 Q. And you don't even know if the way he was carrying 13 himself at that time, which Jude said was 14 different from the way he normally carried 15 himself, was in any way indicative to the server 16 that he shouldn't have been served alcohol, 17 correct? 18 MR. FARRAH: Objection. 19 A. Based on that time issue, yes. 20 Q. Well, not just based on the time. How did the way 21 he carry himself change? 22 A. I don't know the specifics. 23 MR. FARRAH: From when to when? 24 A. From usual to now?</p>
<p style="text-align: right;">Page 158</p> <p>1 time they came out. 2 Q. Okay. 3 A. But if you eat after you drink, it really doesn't 4 matter. It's like closing the door after the 5 horse left the barn. 6 Q. But he's already started with the appetizers, 7 correct? 8 MR. FARRAH: Objection. 9 A. Yes. 10 Q. Okay. Assuming Kristen's pour, would you have a 11 problem if she had poured him one of -- what she 12 said was the pour at 8:51, would you not serve him 13 another one of what we'll call the Kristen pour, 14 at 9:21? 15 MR. FARRAH: Objection. 16 Q. Based on your -- what you know about this case? 17 MR. FARRAH: Objection. 18 A. I don't know. I think in this -- right around 19 this time frame it might be when they were 20 creating a little bit of a disturbance or a 21 loud -- a loudness to the point where Kristen was 22 aware of it, which means that it might have 23 happened prior to this, I don't know. So I don't 24 know what kind of behavior they displayed.</p>	<p style="text-align: right;">Page 161</p> <p>1 Q. Well, you said he was carrying himself differently 2 than he normally does, correct? 3 MR. FARRAH: Jude said that. 4 Q. Jude said that, correct? 5 A. Jude. 6 Q. How does he normally carry himself? 7 MR. FARRAH: Objection. 8 A. I don't know. I'd have to ask Jude. 9 Q. Okay. How was he then carrying himself when he 10 was carrying himself differently at the 11 restaurant? 12 A. Again, I'd have to ask Jude. 13 Q. Okay. So can you opine whether or not the 14 waitress should have known the difference based on 15 what you know about the facts? 16 MR. FARRAH: Objection. 17 A. The only thing that -- again, with the time issue, 18 I don't have it, so I really can't say. 19 Q. Well, regardless of the time issue. 20 A. If he had glassy eyes, he shouldn't have been 21 served at all. 22 Q. Let's stick to this issue first. 23 A. Okay. 24 MR. FARRAH: Which issue is this?</p>
<p style="text-align: right;">Page 159</p> <p>1 There's not enough evidence for me to 2 say, yes, I would feel comfortable. Right at this 3 point, I can't say that I would feel comfortable. 4 Q. So if you don't -- if you can't say whether she 5 should or should not have served him at that time, 6 then clearly you can't be critical of her serving 7 him at that time, correct? 8 MR. FARRAH: Objection. 9 A. I guess that would be safe to assume. 10 Q. Well, do you have a criticism, based on if it was 11 her pour, of serving him another Manhattan at this 12 point? 13 MR. FARRAH: Objection. 14 A. I really don't know. I'd have to be there to see 15 that, see the kind of cues that they were giving. 16 Q. Other than the loudness, are you aware of any cues 17 that Mr. Southworth exhibited before he was served 18 the last round of drinks at the Longhorn that 19 evening that would have indicated to the server 20 that he should not be served any more alcohol? 21 MR. FARRAH: Objection. 22 A. All I know is that Jude mentioned the fact that he 23 had glassy eyes, and that he was -- didn't carry 24 himself the way he normally does. So that's the</p>	<p style="text-align: right;">Page 162</p> <p>1 Q. The issue here is the issue of the way he was 2 carrying himself. 3 You say that Jude Connolly said he was 4 carrying himself differently, correct? 5 A. Yes. 6 Q. Okay. What about the way he was carrying himself 7 differently, regardless of time, should have 8 alerted the server that he shouldn't have gotten 9 more alcohol? 10 MR. FARRAH: That standing alone, 11 carrying himself? 12 MR. GILLIS: Yes, that by itself. 13 MR. FARRAH: Objection. 14 A. There's not enough of a description, other than 15 the fact that he said he was carrying himself 16 differently, to give me an opinion or be able to 17 make an opinion at this point. 18 Q. Okay. So you -- okay. 19 A. He didn't give me enough information, is I guess 20 what I'm saying. 21 Q. There's no evidence in there that the way he was 22 carrying himself differently was so different or 23 bizarre that a server should have picked up on it, 24 correct?</p>

<p style="text-align: right;">Page 163</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. I don't know.</p> <p>3 Q. Okay. And was Mr. Southworth the only loud person</p> <p>4 at the table, or was the entire table loud?</p> <p>5 A. I think the entire table was loud.</p> <p>6 Q. Okay. So is it your opinion that the entire table</p> <p>7 should not have been served any more alcohol when</p> <p>8 it became loud?</p> <p>9 MR. FARRAH: Objection.</p> <p>10 A. It's possible. I don't know. I don't know about</p> <p>11 the specifics. I don't know the time frame, or</p> <p>12 degree, or length of time that they were loud.</p> <p>13 All I know is Michael Espy did testify that he was</p> <p>14 intoxicated and he had been drinking before he got</p> <p>15 there, so that would worry me. And if he's in a</p> <p>16 group of people that are drinking hard liquor</p> <p>17 drinks, that would worry me, too.</p> <p>18 That would be a table that I might shut</p> <p>19 the whole table off based on the revelry of the</p> <p>20 party.</p> <p>21 Q. Okay. But you didn't answer the question. You</p> <p>22 said possibly.</p> <p>23 Would you have shut the whole table off</p> <p>24 based on the fact that they were loud that night?</p>	<p style="text-align: right;">Page 166</p> <p>1 Q. No. Are you going to opine to a</p> <p>2 reasonable -- like you said in your opinion, to a</p> <p>3 reasonable degree of -- to a reasonable degree of</p> <p>4 responsible alcoholic beverage service certainty</p> <p>5 and professional certainty Leigh Chabot padded</p> <p>6 that bill?</p> <p>7 A. Sure.</p> <p>8 MR. FARRAH: Objection.</p> <p>9 Q. Sure?</p> <p>10 A. Yes.</p> <p>11 Q. That's your opinion?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. Is it your opinion that 19 drinks in an of</p> <p>14 itself is inappropriate to serve to any table?</p> <p>15 MR. FARRAH: Objection. Are we talking</p> <p>16 about the double and triple drinks or the</p> <p>17 drinks --</p> <p>18 MR. GILLIS: 19 drinks in total.</p> <p>19 MR. FARRAH: Objection.</p> <p>20 A. Run the question by me again, please.</p> <p>21 Q. Is it your opinion that it's inappropriate to</p> <p>22 serve 19 drinks to a table, period?</p> <p>23 MR. FARRAH: Period?</p> <p>24 A. Just to any table? With any -- one person at it</p>
<p style="text-align: right;">Page 164</p> <p>1 MR. FARRAH: Just based on the fact that</p> <p>2 they were loud?</p> <p>3 MR. GILLIS: Yes.</p> <p>4 A. Possibly, yes.</p> <p>5 Q. So you don't have an opinion yes or no, it's just</p> <p>6 a possibility?</p> <p>7 A. Well, it's just -- it's more of a probability than</p> <p>8 not, especially with the fact that there was one</p> <p>9 guy in a black cowboy hat and black hair that was</p> <p>10 ordering for the table; that drinks were brought</p> <p>11 to the table that were taken back to the bar,</p> <p>12 which leads me to believe that nobody was asked if</p> <p>13 they wanted a drink, that a drink would be put in</p> <p>14 front of them; that seven Manhattans went out to</p> <p>15 the table and there were only six people of age</p> <p>16 there at that time. So it leads me to believe</p> <p>17 that they were padding the check.</p> <p>18 There's no evidence to indicate that that</p> <p>19 martini -- that Manhattan that was taken off the</p> <p>20 bill -- was ever taken off the bill that was</p> <p>21 brought back to the bar.</p> <p>22 So it's like, okay, here we go, we got a</p> <p>23 good table coming, we're going to have a</p> <p>24 high-volume check.</p>	<p style="text-align: right;">Page 167</p> <p>1 or --</p> <p>2 Q. Just any table.</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. It would concern me. It would seem irresponsible.</p> <p>5 Q. Regardless of how many people at the table?</p> <p>6 A. No. That's not what you asked me. If there was</p> <p>7 one person at a table, it would definitely be</p> <p>8 irresponsible. If it's 19 drinks, it would</p> <p>9 concern me. If they're double drinks or triple</p> <p>10 drinks, then it really isn't that many, it's close</p> <p>11 to 40 drinks.</p> <p>12 Q. If there were 40 people at the table, would you</p> <p>13 have a problem with the 19 drinks being served?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. If nobody's intoxicated and everybody's of age, no</p> <p>16 harm.</p> <p>17 Q. Okay. So you'd agree with me that the number of</p> <p>18 people drinking the drinks is important, correct?</p> <p>19 A. Absolutely.</p> <p>20 Q. Okay. And based on the number of drinks served to</p> <p>21 this table that night, which was 17 Manhattans and</p> <p>22 two beers, vessels of beer and vessels of</p> <p>23 Manhattan, the total number of drinks divided by</p> <p>24 the number of people there is two drinks for</p>
<p style="text-align: right;">Page 165</p> <p>1 Q. So it's your opinion in this case that Leigh</p> <p>2 Chabot was padding the bill?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. It seemed that way to me.</p> <p>5 Q. Are you going to opine that at trial, based on the</p> <p>6 evidence and the facts that you've seen in this</p> <p>7 case, that Leigh Chabot padded that bill?</p> <p>8 MR. FARRAH: Objection. What he's going</p> <p>9 to opine to at trial is in part based on my</p> <p>10 strategy, so I object to the question.</p> <p>11 Q. You can still answer.</p> <p>12 A. The fact that she didn't -- that there's no</p> <p>13 evidence to indicate that Jack Daniels was taken</p> <p>14 off the bill; that there was no evidence to</p> <p>15 indicate that she asked everybody if they'd like a</p> <p>16 drink, which is contrary to their trainings, would</p> <p>17 lead me to believe so.</p> <p>18 Q. And is that to a reasonable degree of alcoholic</p> <p>19 safe service that you're going to opine that she</p> <p>20 padded the check?</p> <p>21 MR. FARRAH: It's the same objection.</p> <p>22 You can answer.</p> <p>23 A. It would be -- as far as responsible service of</p> <p>24 alcohol, it is not responsible service of alcohol.</p>	<p style="text-align: right;">Page 168</p> <p>1 everybody, and three drinks for four people,</p> <p>2 correct?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. Well, again, that's what we disagree about. The</p> <p>5 vessel, in my opinion, is at least two drinks in</p> <p>6 all of those, so you'd have to double that number.</p> <p>7 Q. Okay. But let's just get to that in a sec.</p> <p>8 MR. FARRAH: Are you finished answering?</p> <p>9 Q. Are you done?</p> <p>10 THE WITNESS: I think so.</p> <p>11 MR. FARRAH: Okay.</p> <p>12 Q. Regardless of the size of the drinks, and not what</p> <p>13 the drink equates to in pure ethanol, there were</p> <p>14 17 vessels of alcohol brought to the table that</p> <p>15 night, correct?</p> <p>16 MR. FARRAH: 19.</p> <p>17 MR. GILLIS: 19, I'm sorry.</p> <p>18 A. 19.</p> <p>19 Q. And you would agree that 19 is two rounds of</p> <p>20 drinks, regardless of what's in it, to everybody,</p> <p>21 and four to -- three drinks -- three vessels of</p> <p>22 drinks to four of the people, correct?</p> <p>23 MR. FARRAH: Objection. Don't answer</p> <p>24 that question. If you're asking him is 19 divided</p>

<p style="text-align: right;">Page 169</p> <p>1 by seven two and five-sevenths, we can stipulate I 2 think to that. Is it two and five-sevenths? 3 MR. GILLIS: Four-sevenths. 4 MR. FARRAH: If you're asking him is 19 5 divided by 6 three and a sixth -- 6 MR. GILLIS: Okay. If you want to 7 testify, do it on your own time. 8 MR. FARRAH: I do want to testify. 9 MR. GILLIS: No, I'm not allowing -- 10 MR. FARRAH: We'll stipulate to both of 11 those. 12 Q. The 19 vessels of drinks that came to the table 13 that evening -- 14 MR. FARRAH: 17 Jack Daniels, two 25 15 ounce beers, per the check, that's 19. 16 Q. How do you divide that up amongst the people at 17 the table as to who had what? 18 MR. FARRAH: Objection. 19 A. I don't know. You're the one that's doing the 20 math thing. All I know is that there were six 21 people drinking the alcoholic beverages, and there 22 were 19 drinks. So if you divide six into 19, you 23 get three and some change per person. 24 Q. Well, what if seven people were drinking?</p>	<p style="text-align: right;">Page 172</p> <p>1 you. 2 Q. Okay. 3 A. Why would a drink be brought out and then taken 4 back if the person wasn't asked and wasn't ready? 5 Q. Well, isn't it the testimony that the drink was 6 ordered, brought out, and the people left the 7 restaurant and left one full drink on the table 8 which she then brought back? 9 MR. FARRAH: Objection. 10 A. No. 11 Q. That's not the testimony? 12 A. The testimony that I recall is that she walked out 13 and saw that somebody didn't finish a drink and 14 bought it back, and it sat at the bar. And then 15 she said he probably finished it and then just 16 didn't ask me to bring it back. I think that's 17 how I read her testimony. 18 Q. Okay. Your understanding of the testimony, upon 19 which you base your opinion that she padded the 20 check, was that while they were sitting at the 21 table she brought one of the drinks back to the 22 bar? 23 A. Because this person -- this individual did not 24 have the one he had in front of him finished.</p>
<p style="text-align: right;">Page 170</p> <p>1 MR. FARRAH: Objection. 2 A. Then you'd be -- then that much less per person. 3 Q. Okay. So if you can't determine what each person 4 drank that night, how do you have an opinion as to 5 whether or not they were reasonably served 6 alcohol? 7 MR. FARRAH: Objection. 8 A. Because again, Michael Espy was intoxicated upon 9 arrival, according to his testimony, which would 10 make it irresponsible; because there was only six 11 people that were of age at that table that night; 12 and those drinks are double drinks and maybe even 13 triple in some circumstances. I don't know 14 exactly how much was in the Manhattan. 15 Q. You've already testified that the -- 16 A. I've said this before. 17 Q. Let's go back to Leigh Chabot for a second. What 18 evidence do you have that she padded the bill? 19 A. The only evidence I have that she padded the bill 20 is THAT she didn't ask -- that she did not -- I 21 don't see any evidence to indicate that she took 22 that Manhattan off the check; and I don't see any 23 evidence that she asked people if they wanted 24 drinks, she just put them in front of them.</p>	<p style="text-align: right;">Page 173</p> <p>1 Q. And that would be responsible service not to bring 2 a drink over while someone else had a drink in 3 front of them, correct? 4 MR. FARRAH: Objection. 5 A. Responsible service would be to ask the guest if 6 they would like a drink, and not make it until you 7 know it's safe to do so. 8 Q. Well, is there -- 9 A. For example -- 10 Q. Do you take -- 11 MR. FARRAH: Wait. I don't think he's 12 finished. 13 Q. Go ahead. Finish your example. 14 A. If their house policy, which I suspected, which 15 testimony reveals it was, that you wouldn't bring 16 a drink out until they finish the one they had, 17 and then when you brought out the drink and the 18 person saw that you were going to take it back, 19 they would finish this one rather quickly. That's 20 generally what people do. It's rare that people 21 will say, yes, you can take that, I'm ready for 22 mine. 23 Q. Okay. And this -- do you think it's improper 24 service to take a drink order while people have</p>
<p style="text-align: right;">Page 171</p> <p>1 Q. What evidence do you have that she didn't ask 2 them? 3 A. She said that one person, the guy with the black 4 hat and the black hair, ordered the drinks; she 5 brought them out, and then took one back. 6 The fact that she took one back leads me 7 to believe, leads me to believe, and I think it's 8 only common sense -- 9 Q. Okay. So you -- there's no evidence whatsoever 10 that she didn't ask every person at the table, 11 correct? 12 MR. FARRAH: Objection. 13 A. There's no evidence to indicate -- 14 MR. FARRAH: That he knows of? 15 Q. That you're aware of. 16 A. That I'm aware of. 17 Q. So as far as your basis that she padded the check, 18 she didn't ask everybody, you don't know whether 19 she did or didn't because that question was never 20 asked at her deposition, correct? 21 A. No, sir, it wasn't. 22 Q. Okay. So you have no basis for that opinion, 23 correct? 24 A. The only basis I have is what I just explained to</p>	<p style="text-align: right;">Page 174</p> <p>1 some portion of a drink still in front of them? 2 A. If it's safe to do so, I don't think it's 3 improper. 4 Q. Okay. And if when you make that drink that person 5 still hadn't finished their drink, it would be 6 appropriate not to bring the new drink over to the 7 table, correct? 8 A. I wouldn't -- it wouldn't be appropriate to make 9 the drink until the one that they had was 10 finished. 11 Q. Okay. So your -- you train people in TIPS not to 12 even take a drink order until the drink in front 13 of the person is completely gone? 14 A. No. What I train people to do is do not serve a 15 fresh drink without taking away the glass from the 16 last drink. 17 Q. Do not serve a fresh drink? 18 A. Correct. 19 Q. Okay. So if she left the drink at the bar and 20 didn't serve it because the gentleman still had 21 something in his glass, that would be safe 22 service, correct? 23 A. No, that would be not a fresh drink, because 24 drinks will warm up or die. You want the drink to</p>

<p style="text-align: right;">Page 175</p> <p>1 be fresh, you want it to be good when it goes out</p> <p>2 there, which means it should be made at the</p> <p>3 time -- it should be just made and then delivered</p> <p>4 right away.</p> <p>5 Q. Well, what do you do under the</p> <p>6 circumstance -- well, it's all right to take a</p> <p>7 drink order when the person still has some alcohol</p> <p>8 in front of them, correct?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. It's not all right to serve that drink as</p> <p>11 long as that person has that drink in front of</p> <p>12 them, correct?</p> <p>13 A. We teach that you do not serve a fresh drink</p> <p>14 without taking away the glass from the last drink.</p> <p>15 Q. So when you -- so it was appropriate for her to</p> <p>16 order the drink when it was ordered and the person</p> <p>17 only had a little left, correct?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. One of the strategies that we use in the training</p> <p>20 program is, obviously, as I said many times, do</p> <p>21 not serve a fresh drink without taking away the</p> <p>22 glass from the last drink. When they're ready,</p> <p>23 you bring it to them. But if they're not ready,</p> <p>24 you don't bring it to them. And you're the only</p>	<p style="text-align: right;">Page 178</p> <p>1 Q. I think we've exhausted the Kristen pour and the</p> <p>2 padding of the check, so let's go back to the</p> <p>3 other pour, which I will suggest to you, for the</p> <p>4 purposes of these questions, is what we'll call</p> <p>5 the menu pour, the two ounces of bourbon and the</p> <p>6 quarter ounce, okay?</p> <p>7 A. Sure.</p> <p>8 MR. FARRAH: Wait a minute. Just so I</p> <p>9 understand, that is if the drink were made exactly</p> <p>10 as the recipe called for it?</p> <p>11 MR. GILLIS: Correct.</p> <p>12 MR. FARRAH: Okay. All right.</p> <p>13 Q. If the drink was made to the recipe, and assuming</p> <p>14 that the recipe was followed when Mr. Southworth</p> <p>15 got his first drink at 8:51, would you believe</p> <p>16 that it was inappropriate -- is it your opinion</p> <p>17 that it was inappropriate to serve him another</p> <p>18 menu'd dimensional drink at 9:21, based on what</p> <p>19 you know about the facts in this case?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. It might be. Again, it depends. At this point</p> <p>22 we're talking he's already had four beers</p> <p>23 pharmacologically and he's already had a drink and</p> <p>24 some change. So it's five and maybe a half drinks</p>
<p style="text-align: right;">Page 176</p> <p>1 one that can decide when they're ready. You have</p> <p>2 to gauge people's sobriety per sip. If you bring</p> <p>3 it to them quickly, they'll end up drinking fast.</p> <p>4 Q. So it was appropriate for her not to bring that</p> <p>5 drink over to the table if the person was either,</p> <p>6 A. still drinking that drink, or B. until you took</p> <p>7 that drink away with something in it, correct?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And if that person was still drinking and</p> <p>10 didn't want the glass taken away, it was</p> <p>11 appropriate for her not to bring that additional</p> <p>12 drink over to the table at that time, correct?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. So do you have any evidence, other than</p> <p>15 that one drink, that there were any drinks ordered</p> <p>16 for that table that didn't -- that weren't</p> <p>17 consumed at the table?</p> <p>18 A. No.</p> <p>19 Q. Okay. So you're testifying that she padded the</p> <p>20 bill because a drink was ordered but wasn't</p> <p>21 actually drunk at the table?</p> <p>22 MR. FARRAH: Objection. He's already</p> <p>23 testified as to the basis for the padding of the</p> <p>24 bill, and it was more than that.</p>	<p style="text-align: right;">Page 179</p> <p>1 that he's had in that time frame. So then I would</p> <p>2 be concerned about him not having something to eat</p> <p>3 before he has another -- anything else to drink.</p> <p>4 Q. Well, is it your opinion that as of 9:21 he didn't</p> <p>5 have anything to drink?</p> <p>6 MR. FARRAH: To drink?</p> <p>7 A. Eat, you mean?</p> <p>8 Q. Excuse me, to eat.</p> <p>9 A. I think he might have started, but it wasn't</p> <p>10 anything substantial. Perhaps maybe a -- I don't</p> <p>11 know how fast he ate. I mean, I don't know what</p> <p>12 his specific intake was that night. I don't -- I</p> <p>13 didn't see anything from him that says what he</p> <p>14 ate.</p> <p>15 Q. Okay.</p> <p>16 A. I don't even know if he ate his whole meal either.</p> <p>17 Q. We have no evidence that he didn't eat his meal,</p> <p>18 correct?</p> <p>19 A. True.</p> <p>20 Q. Okay. And you have no evidence that he didn't eat</p> <p>21 his chowder or his Tonion, correct?</p> <p>22 A. No.</p> <p>23 Q. And you have no evidence that he didn't eat his</p> <p>24 salad, correct?</p>
<p style="text-align: right;">Page 177</p> <p>1 A. Yes, I did. It was more than that, right.</p> <p>2 Q. Okay. You would expect that if a person ordered</p> <p>3 the drink, the drink was made, the drink wasn't</p> <p>4 served because the person hadn't drank completely</p> <p>5 their prior drink, that it's incumbent upon the</p> <p>6 restaurant then to remove that from the bill if</p> <p>7 the people pay and leave?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 A. It should have been -- yes, it should have been</p> <p>10 removed from the bill.</p> <p>11 Q. Failure to do that is padding the check?</p> <p>12 MR. FARRAH: Objection.</p> <p>13 A. That's what I -- that's what I perceive as padding</p> <p>14 the check, yes.</p> <p>15 Q. And that -- you teach that in the TIPS program?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. Pad the check?</p> <p>18 Q. That not taking a drink off, even if it was</p> <p>19 ordered, is equivalent of padding the check?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. No, I never get to that, because --</p> <p>22 Q. Okay.</p> <p>23 A. -- we don't have to go that far.</p> <p>24 (Short break was taken.)</p>	<p style="text-align: right;">Page 180</p> <p>1 A. No.</p> <p>2 Q. You have no evidence that all of that except for</p> <p>3 the entree came prior to getting his drink at</p> <p>4 9:21, correct?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. Correct.</p> <p>7 Q. Okay. And when you make these opinions, you're</p> <p>8 not there at the restaurant --</p> <p>9 A. No, sir.</p> <p>10 Q. -- to actually see this, correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. So you have to do it on what's the most</p> <p>13 reasonable fact pattern, correct?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. I would say yes.</p> <p>16 Q. Okay. And you opine on what you find to be the</p> <p>17 reasonable set of facts and conditions based on</p> <p>18 your training, your experience, and your</p> <p>19 education, correct?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And based on all of that, it's your opinion</p> <p>23 that he had eaten food -- maybe not his entree,</p> <p>24 but he had eaten food before 9:21 p.m. that</p>

<p style="text-align: right;">Page 181</p> <p>1 evening, correct?</p> <p>2 A. I would think.</p> <p>3 Q. Okay. Now, if you're not sure whether you would</p> <p>4 or would not have served him at 9:21, assuming</p> <p>5 that at 8:51 he got his Manhattan that was made to</p> <p>6 the menu specifications, and that his Manhattan at</p> <p>7 9:21 was made to the manufacturer's -- the menu's</p> <p>8 specifications, is it fair to say that you cannot</p> <p>9 criticize the server for bringing that drink,</p> <p>10 because you're not sure whether or not the drink</p> <p>11 should have been brought in the first place?</p> <p>12 MR. FARRAH: Objection.</p> <p>13 A. Probably.</p> <p>14 Q. Okay. Now, at 9:21 there's one, two, three, four</p> <p>15 Jack Daniels Manhattans brought, correct? Three</p> <p>16 at the bottom of that page, one at the top of the</p> <p>17 next?</p> <p>18 A. Yes.</p> <p>19 Q. And three minutes later there's three more, for a</p> <p>20 total of seven drinks, correct?</p> <p>21 A. They were rang in at that time, yes.</p> <p>22 Q. Okay. And is it your understanding that's another</p> <p>23 one round for seven for the table?</p> <p>24 MR. FARRAH: Objection.</p>	<p style="text-align: right;">Page 184</p> <p>1 Q. Okay. Now, if the seven came for the seven people</p> <p>2 at the table, it's your understanding that one of</p> <p>3 them went to Mr. Southworth, correct?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Are you aware of any other drinks that were</p> <p>6 served to Mr. Southworth at the Longhorn</p> <p>7 Steakhouse that evening?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 A. Not from what I've read.</p> <p>10 Q. Okay. And at 9:57 you see that they cashed out,</p> <p>11 correct? Page 11.</p> <p>12 A. The check was printed at 9:57, closed out check at</p> <p>13 9:57, logged out at 9:58.</p> <p>14 Q. Okay.</p> <p>15 A. Yes.</p> <p>16 (Pause.)</p> <p>17 Q. At what point that evening, based on what you've</p> <p>18 just testified to as to what was served to</p> <p>19 Mr. -- well, strike that.</p> <p>20 I believe you testified, and correct me</p> <p>21 if I'm wrong, that at 9:21 you can't say whether</p> <p>22 you would or would not have served Mr. Southworth</p> <p>23 that Manhattan if it was served to the menu</p> <p>24 specifications, correct?</p>
<p style="text-align: right;">Page 182</p> <p>1 A. I'm not sure. I don't know if they brought the</p> <p>2 three afterwards and the four first, or all</p> <p>3 together at once. I'm really not sure. It</p> <p>4 doesn't say enough there to tell me.</p> <p>5 Q. Okay. Based on --</p> <p>6 A. It was seven drinks that went out in a period of</p> <p>7 three minutes, four minutes.</p> <p>8 Q. Based on your experience, your training, your</p> <p>9 education, your 22-plus years of training people</p> <p>10 on alcohol awareness, is it your opinion that</p> <p>11 those seven drinks combined went to the seven</p> <p>12 individuals at the table?</p> <p>13 MR. FARRAH: Objection.</p> <p>14 A. Perhaps.</p> <p>15 Q. Well, what logical conclusion do you draw, based</p> <p>16 on the fact that seven Manhattans were served to</p> <p>17 the table, four ordered at 9:21 and three ordered</p> <p>18 at 9:24, in light of the fact that at 8:51 seven</p> <p>19 were ordered for the whole table all at once?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. 8:51, okay. I'm not sure when she took that last</p> <p>22 Manhattan back. It could have been in this group</p> <p>23 of Manhattans then, correct?</p> <p>24 Q. I'm not getting to that yet. I'm just getting to</p>	<p style="text-align: right;">Page 185</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. Right. I think I said that.</p> <p>3 Q. So at least if the drinks were served to him at</p> <p>4 the menu specifications, you would agree that he</p> <p>5 was not in the red zone, correct?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. No.</p> <p>8 Q. You would not agree?</p> <p>9 A. No.</p> <p>10 Q. Okay. Well, you wouldn't serve someone in the red</p> <p>11 zone, correct?</p> <p>12 A. I'd probably -- there's times I won't serve people</p> <p>13 in the yellow zone, too.</p> <p>14 Q. Okay. But you're not sure whether you would or</p> <p>15 would not have served him at 9:21, correct?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. Right. I've said that -- I've testified to that.</p> <p>18 Q. So he couldn't have been in the red zone, because</p> <p>19 there's no way you would have served him if you</p> <p>20 thought he was in the red zone at 9:21, correct?</p> <p>21 A. There's absolutely no way I would have served him</p> <p>22 if he was in the red zone, correct.</p> <p>23 Q. And do you know whether his drink was part of the</p> <p>24 9:21 order or the 9:24 order?</p>
<p style="text-align: right;">Page 183</p> <p>1 were these orders which were three minutes apart</p> <p>2 totaling seven, is it your understanding that that</p> <p>3 was one round for everybody at the table?</p> <p>4 A. Perhaps, yes.</p> <p>5 MR. FARRAH: Objection.</p> <p>6 Q. Well, not perhaps. What is your -- what do you</p> <p>7 believe it is?</p> <p>8 MR. FARRAH: Objection.</p> <p>9 Q. What's your opinion?</p> <p>10 MR. FARRAH: Objection.</p> <p>11 A. It may very well be.</p> <p>12 Q. Okay. Do you have an opinion as to where those</p> <p>13 seven Manhattans went when they were ordered at</p> <p>14 9:21 and 9:24?</p> <p>15 MR. FARRAH: Objection.</p> <p>16 A. To the seven people at the table.</p> <p>17 Q. Okay. And that's based on your education,</p> <p>18 training and experience, and your review of the</p> <p>19 materials that you reviewed in this case, correct?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Now, one of those drinks is the one that</p> <p>23 was brought back, correct?</p> <p>24 A. Probably.</p>	<p style="text-align: right;">Page 186</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. I think we talked about the fact that you thought</p> <p>3 it was all delivered at the same time, within a</p> <p>4 three-minute time frame.</p> <p>5 Q. You don't see a difference between the two?</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. Not in terms of the way you phrased the last</p> <p>8 questions to me, no.</p> <p>9 Q. Well, I --</p> <p>10 A. I think we just both agreed that they were going</p> <p>11 to be delivered all at the same time.</p> <p>12 Q. Is that your understanding, based on the review of</p> <p>13 the facts?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. It seems that way to me.</p> <p>16 Q. Okay. Is that the most logical fact pattern,</p> <p>17 based on your experience, training and expertise?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. I don't know how logical it is. I don't</p> <p>20 understand why it wasn't rung in all at once at</p> <p>21 the same time, why it was broken down like that.</p> <p>22 There may be an explanation to it. She might have</p> <p>23 been distracted by somebody else and had to go</p> <p>24 somewhere and then came back. I really don't</p>

<p style="text-align: right;">Page 187</p> <p>1 know. I wasn't there.</p> <p>2 Q. Okay. You testified -- you state in your opinion</p> <p>3 that Rare served Mr. Southworth into and while in</p> <p>4 the red zone.</p> <p>5 That's under -- it's Paragraph 2 under</p> <p>6 Section 6.</p> <p>7 What do you base that conclusion on?</p> <p>8 A. On the testimony of Jude.</p> <p>9 Q. What testimony?</p> <p>10 A. That he was -- he had glassy eyes, that he was</p> <p>11 loud, and that according to -- he didn't carry</p> <p>12 himself in the same way. But the fact -- glassy</p> <p>13 eyes would be an indication his finer motor skills</p> <p>14 were being affected, then somebody with that</p> <p>15 should not be served alcohol. That would be red</p> <p>16 zone, as far as I was concerned. That's what I</p> <p>17 mean by that.</p> <p>18 Q. What he actually -- so it's the glassy eyes,</p> <p>19 correct?</p> <p>20 A. The glassy eyes are very significant.</p> <p>21 Q. Very significant. But you don't know when in the</p> <p>22 evening he exhibited glassy eyes, do you?</p> <p>23 A. I do not know the exact time.</p> <p>24 Q. And if he didn't exhibit glassy eyes until some</p>	<p style="text-align: right;">Page 190</p> <p>1 him before that 30-minute time frame. Based on</p> <p>2 the actual number. And I don't agree with the</p> <p>3 recipe. I don't agree with her comments.</p> <p>4 Q. You already testified, based on the recipe, you're</p> <p>5 not sure if you would or would not have served him</p> <p>6 at 9:24, correct?</p> <p>7 A. More than likely or not I wouldn't have.</p> <p>8 Q. Well, you're not sure one way or the other,</p> <p>9 correct?</p> <p>10 MR. FARRAH: Objection.</p> <p>11 A. Yes, I'm not sure one way or the other.</p> <p>12 Q. Okay. And you understand that the testimony as to</p> <p>13 his eyes being glassy, you said Jude said that?</p> <p>14 A. I believe so.</p> <p>15 Q. Okay. But Jude also said that he wasn't even</p> <p>16 looking at his eyes. Do you remember that</p> <p>17 testimony?</p> <p>18 A. No.</p> <p>19 Q. Well, let me show it to you. This is Page 50, 51</p> <p>20 of his deposition. You can start reading at the</p> <p>21 bottom of 50 and then --</p> <p>22 A. Which one is this? What's the date of this one?</p> <p>23 Q. This is in the prior case, the one before we got</p> <p>24 involved and only Mr. Farrah was asking questions.</p>
<p style="text-align: right;">Page 188</p> <p>1 time after 9:24, then that wouldn't be a factor as</p> <p>2 to whether or not he was served in the red zone,</p> <p>3 correct?</p> <p>4 A. It's possible. It could be only because what I</p> <p>5 think a drink is in the vessel as opposed to what</p> <p>6 you tell me in the Rare recipe is.</p> <p>7 Q. Is it fair to assume that if you're claiming they</p> <p>8 shouldn't have served him, that he was in the red</p> <p>9 zone, that he would have to be in the red zone at</p> <p>10 the time they served him? Is that fair to say?</p> <p>11 A. No, no. You can get into the red zone after one</p> <p>12 sip of a drink. But you could also -- like I told</p> <p>13 you before, I -- the key to responsible server</p> <p>14 training is to not get somebody in the red zone.</p> <p>15 Q. Okay.</p> <p>16 A. Is to intervene before they become intoxicated,</p> <p>17 which means certainly in the beginning, and then</p> <p>18 definitely at the beginning of the yellow zone.</p> <p>19 Q. You have testified in this case that they served</p> <p>20 him when he was already in the red zone, correct?</p> <p>21 A. Correct.</p> <p>22 Q. And the reason you say he was in the red zone was</p> <p>23 his eyes were glassy, correct?</p> <p>24 A. Yes.</p>	<p style="text-align: right;">Page 191</p> <p>1 A. When it was closer towards the accident scene, or</p> <p>2 when the -- closer towards that, as opposed</p> <p>3 to -- he had two depositions, didn't he?</p> <p>4 Q. Yes. Start at the bottom here, and read the</p> <p>5 question.</p> <p>6 (Pause.)</p> <p>7 A. Well, down on Page -- on Page 51 it says, yes, his</p> <p>8 eyes, yes, maybe were glassy.</p> <p>9 Q. Maybe?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And then what does it say at the top of the</p> <p>12 next page?</p> <p>13 A. I don't remember specifically seeing his eyes, you</p> <p>14 know, looking, seeing them, the glossy. But very</p> <p>15 well, very well could have. That could be.</p> <p>16 Q. Okay. So based on that testimony, you've opined</p> <p>17 that his eyes were glassy, even though he says he</p> <p>18 doesn't remember looking at his eyes?</p> <p>19 MR. FARRAH: Objection. You don't have</p> <p>20 to argue with the witness. I mean, the testimony</p> <p>21 is --</p> <p>22 MR. GILLIS: I'll ask my questions my</p> <p>23 way, okay?</p> <p>24 MR. FARRAH: I understand, but you don't</p>
<p style="text-align: right;">Page 189</p> <p>1 Q. Okay. But there's no evidence whatsoever in the</p> <p>2 testimony to date in this case that indicates that</p> <p>3 his eyes were glassy before he was served his last</p> <p>4 drink, isn't that correct?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. We don't have an exact time of when his eyes were</p> <p>7 glassy. We don't have an exact time of when he</p> <p>8 was loud, when the table was disruptive to the</p> <p>9 point where manager and server had to go there.</p> <p>10 But those are all significant issues for red zone</p> <p>11 behavior.</p> <p>12 Q. Okay. And if that red zone behavior occurred</p> <p>13 around 10:30 p.m., that wouldn't play a factor in</p> <p>14 whether or not he was in the red zone at 9:24 when</p> <p>15 the last drink was ordered, correct?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. I don't know that for sure, no.</p> <p>18 Q. Okay. Well, how can you put him in the red zone</p> <p>19 for signs that occurred 30 minutes plus after he</p> <p>20 was served the drink?</p> <p>21 MR. FARRAH: If they occurred 30 minutes</p> <p>22 plus after? If they occurred?</p> <p>23 MR. GILLIS: Yes.</p> <p>24 A. Based on the number of drinks that were served to</p>	<p style="text-align: right;">Page 192</p> <p>1 have to argue with the witness.</p> <p>2 A. Based on the fact of the amount of alcohol that</p> <p>3 was served to him for this person to see the</p> <p>4 slightest hint of that stuff leads me to believe</p> <p>5 that it's more likely than not that he was in the</p> <p>6 red zone at that point in time.</p> <p>7 Q. Did you look at any of the grand jury testimony</p> <p>8 that was prior to that deposition?</p> <p>9 A. I don't believe I did.</p> <p>10 Q. Okay. And if I was to tell you the grand jury</p> <p>11 said there were no visible signs of intoxication</p> <p>12 that evening, would that affect your opinion in</p> <p>13 this case?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. Not based on the amount of alcohol that was served</p> <p>16 over that period of time.</p> <p>17 Q. You keep talking about the amount of alcohol that</p> <p>18 was served. Is it your opinion that the</p> <p>19 Manhattans that were served to Mr. Southworth had</p> <p>20 more alcohol in them than the menu called for?</p> <p>21 MR. FARRAH: Objection.</p> <p>22 A. Yes.</p> <p>23 Q. Based on what?</p> <p>24 A. Based on experience. Based on the fact that the</p>

<p style="text-align: right;">Page 193</p> <p>1 alcohol came about a quarter of an inch from the 2 top of the glass. Based on perceived value. 3 Q. But you don't have an opinion as to how much 4 alcohol was in the glass? 5 A. I have a -- I would -- I can safely say that it's 6 two to three drinks in one glass, somewhere in 7 that vicinity, pharmacologically. I can't tell 8 you the exact amount of alcohol, but it was 9 definitely not one drink pharmacologically. 10 Q. And pharmacologically one drink would be 11 characterized as .5 ounces of pure alcohol, 12 correct? 13 A. Half an ounce of pure alcohol, correct. 14 Q. So based on what Kristen says, you don't have a 15 problem with the amount of alcohol that she says 16 was poured in the drinks, correct? 17 MR. FARRAH: Objection. 18 A. The -- she said she poured an ounce and a quarter 19 of Jack Daniels and a quarter of an ounce -- or a 20 half an ounce of vermouth, somewhere in that 21 vicinity. If it was that kind of a drink, then it 22 wouldn't be that -- as bad as what I suspect it 23 really truly was. 24 Q. And if it was based on the menu, you've already</p>	<p style="text-align: right;">Page 196</p> <p>1 A. Yes. 2 Q. Number 3, under 6 is you say that they failed to 3 implement a policy of having different people in 4 different parts of the restaurant communicate to 5 one another the amounts Mr. Southworth was -- had 6 consumed, violating Bar Code and industry 7 standards, correct? 8 A. Yes. 9 MR. FARRAH: Can you hold one second? I 10 just need to know where we are. 11 MR. GILLIS: Paragraph 3 under 12 Paragraph 6. 13 MR. FARRAH: Okay. Thank you very much. 14 Q. Is it your testimony there was no communication 15 between the various parties that worked for the 16 Longhorn Steakhouse on that evening concerning the 17 alcohol served to Mr. Southworth? 18 A. It was -- 19 MR. FARRAH: Objection. 20 A. There was testimony by Leigh indicating that she 21 did not check from the bartender whether he 22 had -- how many drinks he had at the bar. And I 23 think Kristen testifies that there was nothing 24 trained that told them to do that.</p>
<p style="text-align: right;">Page 194</p> <p>1 testified that you might or might not serve him 2 that last drink at 9:21 or 24? 3 A. More than likely. 4 MR. FARRAH: Objection. 5 Q. So the only criticism you have is your opinion 6 that there was more than the menu amount of 7 alcohol in that drink, based on the drink being up 8 to one quarter inch from the top, correct? 9 MR. FARRAH: Objection. 10 A. Yes, I believe so. 11 Q. Okay. And you read Chuck Boulliane's deposition 12 where he said the drinks come to no more than a 13 third of an inch from the top, correct? 14 A. Was it a third or an inch from the top? 15 Q. Boulliane said no more than a third, correct? 16 MR. FARRAH: Objection. 17 A. Yes, I think he -- I think he said something to 18 that effect. I thought it was an inch, but it 19 might have been a third. I'm sorry, a third from 20 the top, okay. 21 Q. Right. He says the drink is two-thirds full in 22 the glass? 23 A. Right, right, yes, exactly. 24 Q. And that's because these have to be carried on a</p>	<p style="text-align: right;">Page 197</p> <p>1 Q. Okay. Is it your understanding that 2 proper -- safe and proper alcohol service requires 3 a server to go to the bartender and find out what 4 the person at their table had to drink every time 5 someone sits at their table came from the bar? 6 MR. FARRAH: Objection. 7 A. It would be a good idea to do that. We encourage 8 that, absolutely. 9 Q. Okay. So for safe service, every time -- well, 10 you said you encourage it. Do you -- 11 A. If you have to wait for a table, and waiting for a 12 table means that people will be drinking in the 13 bar on an empty stomach before they sat down to 14 dinner. 15 Q. Okay. 16 A. And that's one of the most important times to 17 communicate with the bartender, and vice versa. 18 Q. So it would be improper for any restaurant that 19 you train not to have the server go over to the 20 bartender and find out what they had to drink at 21 the bar before they came to their table if there 22 was a wait for dinner? 23 A. It wouldn't be totally improper in every 24 circumstance, no.</p>
<p style="text-align: right;">Page 195</p> <p>1 tray, correct? And you know those glasses, 2 correct? 3 MR. FARRAH: Objection. 4 Q. Those glasses sway very easily, don't they? 5 MR. FARRAH: Objection to the three 6 questions. 7 Q. So if the glass were filled to the top, a good 8 portion would pour out most likely before you get 9 to a table, correct? 10 MR. FARRAH: Objection. 11 A. It's conceivable, yes. 12 Q. Conceivable or probable? 13 MR. FARRAH: Objection. 14 A. It's probably more probable than not that some 15 would spill out. 16 Q. Okay. So even if it were filled up to the top, 17 when it got to the table it wouldn't be at the 18 top, correct? 19 A. If it spilled on the way, no. 20 Q. And your -- there's no evidence in any of the 21 materials that you read that you're basing your 22 opinion on, it's just based on your experience of 23 perceived value, correct? 24 MR. FARRAH: Objection.</p>	<p style="text-align: right;">Page 198</p> <p>1 Q. Well, what circumstances would it be proper and 2 what circumstances would it be improper? 3 A. Well, I would say that the -- these guys just came 4 off of a full day of -- or a full afternoon of 5 dirt biking, and they were thirsty and drinking, 6 and that would be one of the circumstances where I 7 would go over and say how many did these guys 8 have, how long were they waiting for a table? I 9 might ask them that first. Have you guys been 10 waiting a long time for a table? Yes. No, ten 11 minutes. Okay. Half an hour, I'll go check. 12 Q. So it was incumbent upon Miss Chabot -- well, 13 strike that. 14 You said that she should have asked 15 because they had been dirt biking and they had 16 been drinking at the bar, correct? 17 A. That would have been a good idea, yes, absolutely. 18 Q. Okay. And how was she supposed to know all of 19 this when they sat down? 20 A. Well, they had been at the place I think 12 times 21 prior, so they had a little bit of a history 22 there, and she kind of knew them anyway. So 23 there's a little bit of a pattern there with these 24 guys.</p>

<p style="text-align: right;">Page 199</p> <p>1 Q. So she's improperly serving these people if, when 2 they sit down at the table, and she has experience 3 with them, she doesn't find out from the bartender 4 what they had to drink before they got to the 5 table? 6 MR. FARRAH: Objection. 7 A. I don't know if I would say it would be totally 8 improper if they didn't display any cues, but it 9 would be wise to do so. 10 Q. Okay. Well, what cues if they did they display 11 when they first sat down at the table? 12 A. I don't have any specific testimony that tells me 13 what kind of cues they displayed when they sat 14 down at the table, that I can recall. 15 Q. There were no cues that would have alerted her to 16 their drinking that night when they sat down at 17 the table, based on the facts that you've reviewed 18 in this case, correct? 19 A. No -- 20 MR. FARRAH: Hold it, I didn't hear the 21 question. There were no cues to alert her to the 22 fact that they were drinking that night? Is that 23 what you said? Could you read the question back? 24 (Readback.)</p>	<p style="text-align: right;">Page 202</p> <p>1 Q. Okay. And the manager touched the table to make 2 sure everything was okay, correct? 3 A. Kristen testified to that. I think Leigh did, 4 too. And I think -- well, yes. 5 Q. And one of the managers too, correct? 6 MR. FARRAH: One of the managers what? 7 Q. Testified that they touched the table? Every 8 table that -- during the evening, correct? 9 MR. FARRAH: Objection. 10 A. Well, Boulliane says that that's their policy, 11 that they touch the tables. 12 But I didn't read anything on Noonan. 13 Apparently he was the manager at the time. 14 Q. Didn't Noonan say that they touch every table 15 every night? 16 A. I think it was Boulliane that said that. At least 17 from what I read. I don't think I read -- 18 Q. Well, regardless of who it was, you read testimony 19 that a manager came over to the table that night, 20 correct? 21 A. Yes. 22 Q. And so there were policies in place for 23 communication between the manager, the bartender 24 and the waitress that evening, correct?</p>
<p style="text-align: right;">Page 200</p> <p>1 MR. FARRAH: Objection. 2 A. No, there were. 3 Q. What? 4 A. Michael Espy's testimony that he was drunk when he 5 got there; that the boys were drinking Jack 6 Daniels and beer at the hotel before they arrived; 7 and the two beers that -- the two 25 ounce beers 8 or the four beers that Southworth had when he got 9 to the table. 10 Q. Okay. What cues did Espy exhibit at the table 11 when he first sat down? 12 A. There was -- in his testimony I didn't read any 13 specific issues. There was -- all he said was he 14 was drunk. 15 Q. But what should the server have seen? Was his -- 16 A. I don't know. I don't know. There's no testimony 17 in his deposition that gives me the specific cues, 18 other than his comment that he was drunk when 19 he -- 20 Q. Okay. So as far as you know, you can't -- as you 21 sit here today, you can't mention one cue that 22 Espy exhibited when he sat down at the table that 23 would have alerted the server that he was 24 intoxicated, correct?</p>	<p style="text-align: right;">Page 203</p> <p>1 A. There was. 2 Q. Okay. 3 (Pause.) 4 Q. Other than the manager communicating about the 5 number of drinks they had there that night, and 6 touching the table, and Leigh Chabot communicating 7 with the people at the table, and Kristen 8 O'Donnell communicating with Leigh Chabot, the 9 server, about what they were drinking that night, 10 who else in the restaurant should have been 11 communicating with those people in order to 12 properly implement the policy that you referred to 13 in Paragraph 6 -- 3? 14 MR. FARRAH: Objection. 15 A. What I was referring to there is Leigh never went 16 to the bar to find out or inquire how many drinks 17 they had. 18 She had to be alerted by Kristen, who was 19 not -- did not have contact with that customer at 20 that time, about the concern. 21 Q. That's your only issue that is the basis of 22 Paragraph 3, correct? 23 MR. FARRAH: Objection. 24 A. That, and the fact that Kristen didn't say</p>
<p style="text-align: right;">Page 201</p> <p>1 A. Other than his testimony that he was drunk, no. 2 Q. No, forget the testimony. Is the testimony a cue? 3 A. No. 4 Q. Okay. I'm asking you what cues did he exhibit 5 when he got to the table that alerted her that he 6 was intoxicated, if any? 7 A. None that I read. 8 Q. Okay. What cues did anybody at the table exhibit 9 when they first sat down that would alert Leigh 10 Chabot that they were intoxicated? 11 A. None that I read. 12 Q. Okay. So what cues should she have seen that 13 would alert her to go to the bar and ask the 14 bartender what they had to drink before they got 15 to the table? 16 A. Nothing that I read. 17 Q. Okay. Are you aware of any evidence that you 18 didn't read that would alert her? 19 A. Not -- no, I'm not. 20 Q. Okay. In fact, the bartender did communicate with 21 Leigh Chabot during the course of the evening, 22 correct? 23 MR. FARRAH: Objection. 24 A. She does testify to that.</p>	<p style="text-align: right;">Page 204</p> <p>1 anything to them beforehand. And the fact that 2 she did say something about them alerts me to the 3 fact that maybe they -- she was concerned about 4 how many drinks she served them before they'd 5 eaten anything. 6 Q. Okay. You read in Kristen's deposition that if 7 she felt there was any issues whatsoever with a 8 person who had been drinking at the bar before 9 they sat at the table, she would directly 10 communicate that to the server, correct? 11 A. Yes. 12 Q. And she didn't in this case, because she had no 13 issues with Mr. Southworth, correct? 14 MR. FARRAH: Objection. 15 A. At that -- at the time they sat at the table, no, 16 apparently. 17 Q. Okay. And as you've previously testified, there 18 were no signs by Mr. Southworth or anybody else at 19 the table when they sat down to have dinner that 20 night that would have alerted Miss Chabot that she 21 should go talk to the bartender about what they 22 had to drink, correct? 23 A. None that I've read in the testimony. I've said 24 that. Nothing that I read in the depositions.</p>

<p style="text-align: right;">Page 205</p> <p>1 Q. So there would have been no reason for her to go 2 to the bartender at that point and ask them what 3 they had to drink, correct? 4 MR. FARRAH: Objection. 5 A. It's always a good practice. If you've been 6 waiting for a table for a half an hour, it would 7 be a good practice to ask how many drinks have 8 they had at the bar. 9 Q. Okay. So in every restaurant that a person waits 10 a half an hour at the bar before they have drinks, 11 you would fault the server for not going up to the 12 bartender and saying what did that person -- that 13 new person at my table have to drink at the bar, 14 even if they exhibited no symptoms that would 15 alert the server when they arrived at the table? 16 A. I wouldn't say fault the server. I would say that 17 it would be wise to do it. 18 Q. Is it improper not to do it? 19 MR. FARRAH: Objection. 20 A. It's not wise to do it. Whether it -- it depends 21 on the circumstances and the issues. 22 Q. Okay. I don't care if it's wise. Is it improper 23 under these circumstances for Leigh Chabot not to 24 have walked over to the bar when they arrived,</p>	<p style="text-align: right;">Page 208</p> <p>1 A. Pizzeria Uno people I've trained. Tons. 2 Q. Okay. Chains like the Olive Gardens and 3 T.G.I. Friday's are very busy restaurants, 4 correct? 5 MR. FARRAH: Objection. 6 A. Yes, they are. 7 Q. It's not unusual for a busy chain restaurant to 8 have a half an hour wait for a table, correct? 9 A. Yes, that's not unusual. 10 Q. And when you trained Friday's, did you tell them 11 that it was improper service not -- for the server 12 not to go to the bar every time someone came from 13 the bar and had been sitting there waiting for a 14 table and then came to their table? 15 MR. FARRAH: Objection. 16 A. I would -- I would answer the question in this 17 manner: That it is proper service to check with 18 the previous server before serving to determine 19 whether they've had a few drinks before they sat 20 at the table. I would suggest to them that use 21 the business as a tool in your favor. I'll be 22 right with you, sir, and check to see how many 23 drinks they've had. That would be proper service. 24 Q. Okay. Based on your experience, is that what</p>
<p style="text-align: right;">Page 206</p> <p>1 based on the facts before her at that time? 2 A. Based on the responsible server alcohol training 3 that's out there, yes, it would be improper. 4 Q. Okay. Based on what? What alerted her to go to 5 the bar at that point? 6 A. Nothing alerted her that -- that would have 7 alerted -- in other words, training programs teach 8 check with the previous server before serving to 9 determine how many drinks they had prior to the 10 table, or prior to their arrival to your table. 11 That's what it says in responsible server training 12 practices. Bar Code says that. TIPS says that. 13 Q. A different server, not the bartender, correct? 14 MR. FARRAH: Objection. 15 Q. If you had someone else handling that table, isn't 16 that what they mean by that? 17 MR. FARRAH: Objection. 18 A. I'm lost now. I'm talking about Leigh. 19 Q. Okay. 20 A. Leigh going to Kristen and saying how many drinks 21 did they have at the bar. That's what 22 training -- responsible training programs teach. 23 Q. Okay. And so if someone doesn't do that in every</p>	<p style="text-align: right;">Page 209</p> <p>1 normally happens at the Friday's that you've 2 trained? 3 MR. FARRAH: Objection. 4 A. I haven't been at the Friday's to see people do 5 this. I've done it myself, so I can't tell you 6 what they're going to do after I train them. 7 Q. Okay. 8 A. That's management's job to make sure that that 9 kind of stuff is done. 10 Q. Name one restaurant that you're aware of that as a 11 practice every time someone who's waited at the 12 bar goes to sit at a table to have dinner, the 13 waiter or waitress then goes to the bartender to 14 inquire as to the amount of alcohol they had to 15 drink at the bar prior to sitting at the table? 16 MR. FARRAH: Objection. 17 A. I can't name one restaurant that does it. 18 It's -- they've been trained to do it. Whether 19 they do it or not, I can't tell you right off the 20 top of my head, because I'm not there when the 21 actual service occurs. 22 Q. Okay. So you tell them to live to this standard 23 that you know nobody agree -- nobody actually 24 practices?</p>
<p style="text-align: right;">Page 207</p> <p>1 circumstance, you'd find that to be improper? 2 MR. FARRAH: Objection. 3 A. It wouldn't be following the responsible server 4 training guidelines, correct. 5 Q. That's not the question. Would you find it to be 6 improper? Yes or no. 7 MR. FARRAH: Objection. 8 A. Yes. 9 Q. Okay. You train restaurants, correct? 10 A. Yes, sir. Yes. 11 Q. You train busy restaurants, correct? 12 A. Yes. 13 Q. You train chain restaurants, correct? 14 A. Yes. 15 Q. What chains do you train in Massachusetts? 16 A. I've trained Friday's. I've trained John Harvard 17 Brewhouse. I've trained -- well, there's no chain 18 now, but Ritz Carltons. Is that a chain? I've 19 trained Marriotts. I've trained Olive Garden 20 people. I've trained -- oh, God, I -- a lot 21 of -- off the top of my head I'm stumped here, but 22 I've trained a lot of people who have worked in 23 chains. 24 Q. Okay. In fact, you trained --</p>	<p style="text-align: right;">Page 210</p> <p>1 MR. FARRAH: Objection. 2 A. No, I didn't say that. People do practice this. 3 Q. Well, you can't name one restaurant that does it 4 that way, can you? 5 A. I imagine if I thought about it, I probably could 6 come up with something. 7 Q. But as you sit here today, you can't? 8 MR. FARRAH: Objection. 9 A. As I sit here today right now at this moment, I 10 can't. 11 Q. Okay. How many other people should have been in 12 the loop of this communication, other than the 13 manager, the bartender and the server? 14 MR. FARRAH: Objection. 15 Q. If anyone? 16 A. That would be sufficient to facilitate -- 17 Q. So the number of people was sufficient. You just 18 thought that Leigh Chabot should have gone over to 19 the bar at the beginning of -- before she served 20 these people anything to drink, correct? 21 MR. FARRAH: Objection. 22 A. To find out how many they had before they sat 23 down. 24 Q. Okay. Now, as part of -- your next thing says</p>

<p style="text-align: right;">Page 211</p> <p>1 that served what were double and potentially</p> <p>2 triple drinks in the form of the 25 ounce beer and</p> <p>3 the Jack Daniels Manhattans served straight up in</p> <p>4 a six ounce glass within one quarter inch of the</p> <p>5 lip.</p> <p>6 I think we've pretty much beaten it to a</p> <p>7 dead horse that to get to a quarter inch from the</p> <p>8 top is the equivalent, with all the ice meltoff,</p> <p>9 of one and a half times the menu quantity of</p> <p>10 alcohol that the Longhorn puts in their drink</p> <p>11 recipe book, is that fair to say?</p> <p>12 MR. FARRAH: Objection.</p> <p>13 A. I would say at a minimum we've agreed to that.</p> <p>14 Q. Well, what would be the maximum?</p> <p>15 MR. FARRAH: Objection.</p> <p>16 A. I don't know. I'd have to see it. It would</p> <p>17 depend on how long they let it sit in the ice. I</p> <p>18 think we've beat this one pretty good.</p> <p>19 Q. So if we're at a quarter inch lip, we're under</p> <p>20 five ounces of alcohol -- of liquid in the glass,</p> <p>21 correct?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. I think we're at five ounces.</p> <p>24 Q. Okay.</p>	<p style="text-align: right;">Page 214</p> <p>1 Q. Okay. I know you're not a math major --</p> <p>2 A. Thank you.</p> <p>3 Q. -- but three and a quarter and three and a quarter</p> <p>4 is six and a half, correct?</p> <p>5 A. I would agree with that.</p> <p>6 Q. So if you properly poured it the way the menu</p> <p>7 says, and the meltoff is what you have written</p> <p>8 about in your book as to what it should be, then</p> <p>9 double this shouldn't be six ounces, it should be</p> <p>10 pouring over the edge, correct?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. It would -- based on those figures, it would pour</p> <p>13 over the edge.</p> <p>14 Q. Okay. And if, according to what you say, the</p> <p>15 drinks were even higher than that, then much more</p> <p>16 than that should be poured over the edge, correct?</p> <p>17 MR. FARRAH: Objection.</p> <p>18 A. Certainly.</p> <p>19 Q. Okay. So it's physically impossible to put double</p> <p>20 the menu recipe in the glass, let alone any more</p> <p>21 alcohol, correct?</p> <p>22 MR. FARRAH: Objection.</p> <p>23 A. No, we did put double the recipe into the glass,</p> <p>24 and you wouldn't have much more room for any more</p>
<p style="text-align: right;">Page 212</p> <p>1 A. Actually, we might be slightly down, because the</p> <p>2 cherry I think disperses about a quarter -- an</p> <p>3 eighth of an inch. No, an eighth of an ounce, I'm</p> <p>4 sorry. An eighth of an ounce.</p> <p>5 Q. So we're just under five ounces of liquid --</p> <p>6 A. Fluid.</p> <p>7 Q. -- with the cherry in it? Fluid.</p> <p>8 A. Yes.</p> <p>9 Q. And I believe we've already agreed or -- we may</p> <p>10 not agree, but it's my understanding from your</p> <p>11 prior testimony that one and a half times the menu</p> <p>12 amount of alcohol in the Longhorn Manhattan comes</p> <p>13 out to about one and a quarter ounce of pure</p> <p>14 alcohol, correct?</p> <p>15 MR. FARRAH: Objection. That's your</p> <p>16 understanding? Objection.</p> <p>17 A. I think so. I think that's what we agreed to.</p> <p>18 Q. .84 for what the menu says.</p> <p>19 A. That's what we agreed to.</p> <p>20 MR. GILLIS: Do you need to take a break?</p> <p>21 MR. FARRAH: No, no. Don't stop.</p> <p>22 Q. So that's clearly not a triple drink, correct?</p> <p>23 MR. FARRAH: Objection.</p> <p>24 A. If in fact it's poured to that, no.</p>	<p style="text-align: right;">Page 215</p> <p>1 alcohol when we did it.</p> <p>2 Q. Did you have any more room?</p> <p>3 A. Yes, we could have got some more in there.</p> <p>4 Q. How much more?</p> <p>5 A. Maybe a quarter of an ounce. Maybe, because we</p> <p>6 didn't have a meniscus. It was right about at the</p> <p>7 top of the glass.</p> <p>8 Q. By the way, do any of the places, other than the</p> <p>9 Longhorn, that you trained serve 25 ounce beers?</p> <p>10 A. I'm sure they do.</p> <p>11 Q. And do you tell those people who serve 25 ounce</p> <p>12 beers that that's inappropriate service?</p> <p>13 A. Yes.</p> <p>14 Q. And that's part of your training, you tell them</p> <p>15 that?</p> <p>16 A. Yes.</p> <p>17 Q. And you train over at Anheuser-Busch, correct?</p> <p>18 A. I train trainers at Anheuser-Busch, yes.</p> <p>19 Q. And you get paid by Anheuser-Busch to train people</p> <p>20 at different places, correct?</p> <p>21 A. I have, yes.</p> <p>22 Q. And you tell them then that they shouldn't be</p> <p>23 allowing people to serve their beer in 25 ounce</p> <p>24 mugs, correct?</p>
<p style="text-align: right;">Page 213</p> <p>1 Q. Okay. And again, the only way you get to a triple</p> <p>2 drink is based on what you believe was in the</p> <p>3 drink that night, and not what the testimony is to</p> <p>4 what was in the drink that night, correct?</p> <p>5 MR. FARRAH: Objection.</p> <p>6 A. Again, depending on how long it was sitting in the</p> <p>7 ice.</p> <p>8 Q. And in fact, when you did double the recipe, you</p> <p>9 were at the edge or over, correct?</p> <p>10 MR. FARRAH: Objection.</p> <p>11 A. You were at the edge.</p> <p>12 Q. But if you properly let it sit in the ice, you'd</p> <p>13 be over the edge, correct?</p> <p>14 MR. FARRAH: Objection.</p> <p>15 A. Either that, or it might have had a meniscus. It</p> <p>16 might have been six ounces.</p> <p>17 Q. Well, properly chilled before it was poured,</p> <p>18 you've testified, should come to three and a</p> <p>19 quarter ounces of liquid, correct?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. In a -- with a two and a half ounce pour, over ice</p> <p>22 chilled, in a four and a half ounce glass.</p> <p>23 Q. Double that is six and a half, correct?</p> <p>24 A. If in fact that's -- yes.</p>	<p style="text-align: right;">Page 216</p> <p>1 A. What I tell them basically is it's stupid to do</p> <p>2 that. If you're going to do it, realize that it's</p> <p>3 two drinks in one glass and not one beer.</p> <p>4 Q. It's not the size of the glass that makes somebody</p> <p>5 intoxicated, it's the amount of alcohol they</p> <p>6 drink, correct?</p> <p>7 A. Correct.</p> <p>8 Q. And so you can safely serve 25 ounce beers, as</p> <p>9 long as you leave the appropriate time interval in</p> <p>10 between, correct?</p> <p>11 MR. FARRAH: Objection.</p> <p>12 A. Certainly.</p> <p>13 Q. Okay. So the size of the drink isn't the problem,</p> <p>14 it's the manner in which the drink is served,</p> <p>15 correct?</p> <p>16 MR. FARRAH: Objection.</p> <p>17 A. As in speed and so forth? Sure, I would agree</p> <p>18 with that.</p> <p>19 Q. Okay. So why do you criticize them for -- tell</p> <p>20 people it's stupid for serving a 25 ounce drink</p> <p>21 that you say can be safely served?</p> <p>22 A. I didn't say it can be safely -- it can be safely</p> <p>23 served, yes, that's true, but what I tend to find</p> <p>24 out in my experience is most people drink beer a</p>

<p style="text-align: right;">Page 217</p> <p>1 little bit quicker in that circumstance, as they</p> <p>2 do in pitchers of beer, because they don't want it</p> <p>3 to warm up or die, because it's easily accessible.</p> <p>4 Q. And what scientific --</p> <p>5 A. Not scientific.</p> <p>6 Q. Okay. It's just your experience?</p> <p>7 A. Correct.</p> <p>8 Q. But not scientific. You don't have any --</p> <p>9 A. When I told you that before --</p> <p>10 MR. FARRAH: You should let him finish</p> <p>11 the question, by the way.</p> <p>12 Q. You don't have any studies that prove that,</p> <p>13 correct?</p> <p>14 A. No, sir.</p> <p>15 Q. That's not a peer reviewed -- there's no peer</p> <p>16 reviewed article that states that people who drink</p> <p>17 taller beers drink faster than if they drink a 12</p> <p>18 ounce beer, correct?</p> <p>19 A. I don't know of any written article, no.</p> <p>20 Q. Okay. In fact, that's not even an opinion that is</p> <p>21 widely accepted in the training field, correct?</p> <p>22 A. If you're calling my students part of the training</p> <p>23 field, then they would -- they would agree with</p> <p>24 it. I haven't had anybody object to it. They</p>	<p style="text-align: right;">Page 220</p> <p>1 better to serve a 12 ounce beer.</p> <p>2 Q. And you've never put it in writing to them that</p> <p>3 that's inappropriate service, correct?</p> <p>4 A. No, sir.</p> <p>5 Q. Okay. You have read the depositions of the two</p> <p>6 people who were with Mr. Southworth at the bar</p> <p>7 that evening, correct?</p> <p>8 A. Yes.</p> <p>9 Q. And that was Jude Connolly, correct?</p> <p>10 A. Yes.</p> <p>11 Q. And who was the other gentleman?</p> <p>12 A. Scott Espy.</p> <p>13 Q. Okay. And when you read their testimony -- did</p> <p>14 you read both depositions of Mr. Connolly?</p> <p>15 A. I believe I did.</p> <p>16 Q. Okay. And is it your understanding that his</p> <p>17 testimony was, in the second deposition, that he</p> <p>18 believes that Mr. Southworth had one 25 ounce beer</p> <p>19 at the bar that evening?</p> <p>20 MR. FARRAH: Objection.</p> <p>21 A. I believe he said that.</p> <p>22 Q. Okay. And in the first case he said -- his first</p> <p>23 answer was one beer at the bar that evening,</p> <p>24 correct?</p>
<p style="text-align: right;">Page 218</p> <p>1 agree with that statement.</p> <p>2 Q. I'm not talking about the students. I'm talking</p> <p>3 about the people who do the training.</p> <p>4 A. I haven't spoken to them specifically on it that I</p> <p>5 recall where I can see something, especially in</p> <p>6 writing.</p> <p>7 Q. Okay. Do you ever write letters to these people</p> <p>8 and tell them that it's stupid to serve a 25 ounce</p> <p>9 beer?</p> <p>10 A. I don't think I've ever written it, put it in</p> <p>11 writing.</p> <p>12 Q. Just mention it to them when you do their training</p> <p>13 program?</p> <p>14 A. Absolutely.</p> <p>15 Q. So you get paid to do a training program for these</p> <p>16 companies that you know are providing stupid</p> <p>17 service, correct?</p> <p>18 MR. FARRAH: Objection.</p> <p>19 A. No. When I say the word stupid, you're making it</p> <p>20 sound like it's a derogatory statement. Their</p> <p>21 explanation is the competition's doing it, so</p> <p>22 that's why I'm doing it. And I said, well, know</p> <p>23 that if you are serving a five or a ten ounce</p> <p>24 martini, that there's really four -- three to four</p>	<p style="text-align: right;">Page 221</p> <p>1 MR. FARRAH: Objection.</p> <p>2 A. In the first deposition?</p> <p>3 Q. His -- when he was first asked the question, his</p> <p>4 answer was he had a beer, correct?</p> <p>5 A. Are we talking about the --</p> <p>6 MR. FARRAH: Objection.</p> <p>7 A. Which deposition?</p> <p>8 Q. First deposition now.</p> <p>9 A. I'm not sure exactly. I know that in one of those</p> <p>10 depositions he spoke of two, and I think in one of</p> <p>11 those depositions they asked the question of what</p> <p>12 would you say to the police at that time, and he</p> <p>13 said two.</p> <p>14 I know the second deposition there was</p> <p>15 discrepancy between the first deposition, but it</p> <p>16 was probably two years thereafter.</p> <p>17 Q. Okay. Well, in the first one he actually said he</p> <p>18 had one beer, and then on further questioning by</p> <p>19 Mr. Farrah, could it have been more than one, he</p> <p>20 said maybe, yes. Is that correct?</p> <p>21 MR. FARRAH: Objection.</p> <p>22 Q. Is that your memory?</p> <p>23 A. I think so.</p> <p>24 Q. Okay. So what are you basing him having two 25</p>
<p style="text-align: right;">Page 219</p> <p>1 to five drinks in one glass. Know that if you</p> <p>2 serve a 24 ounce beer or 25 ounce beer, you're</p> <p>3 really serving two beers to a customer in one</p> <p>4 glass, period.</p> <p>5 Q. No one from Longhorn has ever told you that's why</p> <p>6 they serve a 25 ounce beer, correct?</p> <p>7 MR. FARRAH: Objection.</p> <p>8 A. I'm sorry?</p> <p>9 Q. No one from Longhorn has ever said that we serve</p> <p>10 25 ounce beers because that's what the competition</p> <p>11 does, correct?</p> <p>12 A. No.</p> <p>13 Q. And no one from Longhorn says that's why we serve</p> <p>14 a martini that particular glass, correct?</p> <p>15 A. Nobody.</p> <p>16 Q. These are from your other customers, correct?</p> <p>17 A. Indeed.</p> <p>18 Q. Okay. And do you train establishments that serve</p> <p>19 16 ounce beers?</p> <p>20 A. Yes, I do.</p> <p>21 Q. And you're critical of serving a 16 ounce beer,</p> <p>22 correct?</p> <p>23 A. I have been -- I have said that to some of my</p> <p>24 clients, yes, in certain circumstances it would be</p>	<p style="text-align: right;">Page 222</p> <p>1 ounce beers at the bar on that evening, as opposed</p> <p>2 to one 25 ounce beer?</p> <p>3 MR. FARRAH: Objection.</p> <p>4 A. Jude's deposition, or the comments that he made to</p> <p>5 the police, which was closer to the time the</p> <p>6 accident occurred.</p> <p>7 Q. Okay. Is it based on the police comments, the</p> <p>8 first deposition, or the second deposition?</p> <p>9 MR. FARRAH: Objection.</p> <p>10 A. Well, there's no real clear-cut indication one way</p> <p>11 or the other, so I guess I went towards the two,</p> <p>12 as opposed to the one.</p> <p>13 Q. Why?</p> <p>14 A. Because I figured at that point in time, he was a</p> <p>15 man that was ready to drink that night, and it was</p> <p>16 more likely than not within a half an hour he</p> <p>17 would have done two 25 ounce beers.</p> <p>18 Q. What was your assumption going into the bar that</p> <p>19 evening that Jeffrey Southworth was on a mission</p> <p>20 when he arrived at the Longhorn that night?</p> <p>21 MR. FARRAH: Objection.</p> <p>22 A. It was more deeper into the -- well, two 25 ounce</p> <p>23 beers in a half an hour would be a man on a</p> <p>24 mission. And then going to Manhattans would be a</p>

<p style="text-align: right;">Page 223</p> <p>1 man on a mission. 2 Q. You've testified that the reason you gave credence 3 to two beers, as opposed to one, was that you felt 4 that when he got there he was on a mission. 5 So how did you make that determination if 6 there's evidence that he may have only had one 7 beer at the bar? 8 MR. FARRAH: Objection. 9 A. There's also evidence -- I'm sorry. 10 MR. FARRAH: Go ahead. 11 A. There's also evidence to indicate that he might 12 have had three or four I think in some of the 13 deposition transcripts I read. So it's -- people 14 are all over the place with this. There's nothing 15 I can pin down. 16 Q. There's not one single person that said he had 17 four beers at the bar that night, isn't that 18 correct? 19 MR. FARRAH: He didn't say at the bar. 20 A. I said three or four overall. There was people 21 that were saying that everybody had beer at the 22 table, and there's only two beers that were on the 23 check, so that makes me wonder did somebody go to 24 the bar and buy beer and come back? I don't know.</p>	<p style="text-align: right;">Page 226</p> <p>1 Q. What specifically did Leigh say that she didn't 2 understand the potency of the drink? 3 A. She thought martinis -- Manhattans were only one 4 drink. Nobody told her that it was -- it was 5 considered two drinks, or that they should be 6 considered two drinks. 7 I don't think she knew the difference. I 8 think she said something to the effect that it was 9 equal to a four-ounce glass of wine. 10 Q. Where did -- well, based on Kristen's -- 11 A. Kristen? 12 Q. Based on what Kristen said was in the Manhattan, 13 that would be accurate, correct? 14 MR. FARRAH: I'm sorry? 15 A. Based on what Kristen said, that would be 16 accurate? 17 Q. Right, that it's one drink? 18 A. Slightly off, because Kristen said an ounce and a 19 quarter, and then a half an ounce of vermouth, so 20 it would be a little bit higher than a four ounce 21 glass of wine, pharmacologically. 22 Q. Well, actually, it would be right at .5, wouldn't 23 it? 24 A. An ounce and a quarter of 80 proof, plus a half an</p>
<p style="text-align: right;">Page 224</p> <p>1 That's what I mean about the -- nothing's 2 hard and fast. I can't put my finger on anything. 3 So it's more likely than not that he had two, 4 basically, is what I went towards. 5 Q. And that's what -- we all went full circle there, 6 but I'm trying to get back to the original 7 question. When he arrived there, and there's 8 testimony he had a 25 ounce beer -- 9 A. Yes. 10 Q. -- what makes you think at that point he was on a 11 mission, if there was testimony that he only had 12 one beer at the bar? 13 MR. FARRAH: Objection. 14 A. Because I didn't believe he only had one beer at 15 the bar, because I heard or saw testimony that 16 indicated that he might have had three or four 17 beers throughout the night. 18 So somewhere along the line he had 19 another beer somewhere; that other people said 20 there was more -- that everybody was drinking beer 21 at the table. 22 Q. Okay. 23 A. So that's why I figured two would be safe. 24 Q. You knew that that testimony that everybody was</p>	<p style="text-align: right;">Page 227</p> <p>1 ounce of vermouth would be a little bit higher. 2 Not much, but a little bit. 3 Q. We'll do the math. 4 A. I guess. 5 Q. So if she going by Kristen's description of what 6 she put in the glass, she did know, correct? 7 A. She wouldn't be far off. 8 Q. Okay. You wouldn't have -- you wouldn't have a 9 criticism of what the potency was, whether or not 10 she knew the potency, if in fact it was poured the 11 way Kristen said it was poured, correct? 12 MR. FARRAH: Objection. 13 A. Probably. 14 Q. And if it was poured pursuant to the menu, it 15 didn't amount to two drinks; we've established 16 that, correct? 17 MR. FARRAH: Objection. 18 A. No, I think we -- it was closer to two drinks than 19 it was one drink. 20 Q. Okay. But it wasn't a double? .84, correct? 21 A. I think that's what we said. 22 Q. Okay. And is there any other employee 23 that -- strike that. 24 You said Kristen didn't understand the</p>
<p style="text-align: right;">Page 225</p> <p>1 drinking beer at the table was not true, correct? 2 MR. FARRAH: Objection. 3 A. I don't know that anything is true on that. I 4 really don't know. 5 Q. Okay. Based on the evidence, is that the most 6 logical conclusion you've drawn, based on looking 7 at the audit report and the bill? 8 MR. FARRAH: Objection. 9 A. I would say that it wouldn't be -- it would be 10 more likely than not that he would have had two 11 beers. 12 Q. Before he got to the table? 13 A. Or he was going to the table with the second beer 14 in hand. 15 Q. Okay. 16 (Pause.) 17 Q. The next paragraph, employees do not recognize the 18 potency of these drinks and were not trained by 19 Rare to do so. 20 MR. FARRAH: Paragraph 5? 21 MR. GILLIS: Paragraph 5. 22 Q. What do you base that opinion on? 23 A. The testimony of Leigh, and the testimony of 24 Kristen.</p>	<p style="text-align: right;">Page 228</p> <p>1 potency of the drink? 2 A. Yes. 3 Q. On what do you base that? 4 A. I think Kristen also didn't -- thought that a 5 Manhattan wasn't two drinks. And also Boulliane I 6 don't think knew -- he didn't believe that Bar 7 Code was correct in saying that you 8 should -- obviously assume that it was more than 9 one drink. 10 Q. Okay. Bar Code says that if you have one pure 11 ounce of ethanol in it, you should consider that 12 two drinks, correct? 13 MR. FARRAH: Objection. 14 A. Correct. 15 Q. So if it's less than that, it's not two drinks, 16 correct? 17 MR. FARRAH: Objection. 18 A. Yes. 19 Q. So when Boulliane and everyone else says it's not 20 two drinks, they're correct? 21 MR. FARRAH: Objection. 22 Q. Based on the menu description of the Manhattans 23 made at the Longhorn, correct? 24 MR. FARRAH: Objection.</p>

<p style="text-align: right;">Page 229</p> <p>1 A. If you're looking at it that way, exactly two 2 drinks, no. 3 Q. Okay. And in fact, the Longhorn menu for a 4 Manhattan is well below the standard in the 5 industry, correct? 6 A. I wouldn't say that it was below the standard in 7 the industry. 8 Q. Okay. Well, you reviewed the Bar Code book, 9 correct? 10 A. Yes. 11 Q. And it says in there that a Manhattan is one and a 12 quarter ounces of pure alcohol, and that's what's 13 to be counted as two drinks, correct? 14 MR. FARRAH: What book are you -- you're 15 showing him something -- hold on. 16 A. Is that pure alcohol? 17 MR. GILLIS: This is the book that you 18 showed Mr. Boulliane. 19 MR. FARRAH: Is it? 20 MR. GILLIS: Yes. 21 MR. FARRAH: So which exhibit was this in 22 the Boulliane deposition? 23 MR. GILLIS: No idea. 24 MR. FARRAH: Okay.</p>	<p style="text-align: right;">Page 232</p> <p>1 him. We're suspending now and when we resume, 2 which should be soon, that when you're done, and I 3 think your limit is seven hours, and I've -- we've 4 deposed him -- you've deposed him for four so far 5 today, something like that. 6 MR. GILLIS: Right. 7 MR. FARRAH: That I'm going to have 8 questions for him after you finish, whether it 9 takes you one, two, or three hours to finish. 10 MR. GILLIS: Okay. 11 MR. FARRAH: Okay. 12 MR. GILLIS: And it doesn't include any 13 redirect after you've cross-examined him. 14 MR. FARRAH: I don't care about that. 15 You can have all the direct you want. I don't 16 care about that. 17 MR. GILLIS: Okay. 18 MR. FARRAH: So why don't we suspend, and 19 let's see if we can agree on a date now. 20 MR. GILLIS: That's good. 21 (Deposition suspended at 3:00 p.m.) 22 23 24</p>
<p style="text-align: right;">Page 230</p> <p>1 MR. GILLIS: If you'd like, I'll 2 photocopy the page, and we can put it in as an 3 exhibit, if you'd like. 4 MR. FARRAH: Yes, let's do that. Let's 5 also be aware of the fact that it's five minutes 6 of 3. 7 MR. GILLIS: Let's finish this issue. 8 (Discussion held off the record.) 9 Q. You're looking at a document that we're having 10 photocopied and that we will put in as Exhibit 8. 11 And in there it says that pursuant to Bar 12 Code, a Manhattan has one and a quarter ounces of 13 pure alcohol, correct? 14 A. It says 1.15. 15 Q. Okay. And 1.15 -- 16 A. It should be counted -- 17 Q. -- ounces of pure alcohol should be counted as two 18 drinks, correct? 19 A. That's what it says in here. 20 Q. Okay. We've established that pursuant to the 21 Longhorn menu, what they put in their drinks is 22 .84, correct? 23 MR. FARRAH: Objection. 24 A. I think we did.</p>	<p style="text-align: right;">Page 233</p> <p>1 COMMONWEALTH OF MASSACHUSETTS 2 3 ***** 4 NANCY ROSARIO, INDIVIDUALLY, AS * 5 SHE IS THE ADMINISTRATRIX OF THE * 6 ESTATE OF A WILDA SANTIAGO, ESSEX * 7 PROBATE COURT DOCKET NO. * 8 03P-2499-ADI, P/WA VERONICA * 9 ROSARIO AND CHRISTINA SANTIAGO, * 10 AND AS SHE IS THE ADMINISTRATRIX * 11 OF THE ESTATE OF JOSE SANTIAGO, * 12 BERLIN (CONNECTICUT) PROBATE * 13 COURT, CASE NO. 03-0713 * 14 versus * 15 16 RARE HOSPITALITY INTERNATIONAL, * 17 INC., d/b/a LONGHORN STEAKHOUSE * 18 ***** 19 I, MICHAEL A. MARCANTONIO, do hereby certify 20 that I have read the foregoing transcript of 21 testimony and further certify that said transcript 22 is a true and accurate record of my testimony 23 given at a deposition in the above-captioned 24 matter on March 1, 2007, at Newton, Massachusetts. 25 26 Signed under the pains and penalties of 27 perjury this ____ day of _____, 28 2007, at _____, Massachusetts. 29 30 MICHAEL A. MARCANTONIO</p>
<p style="text-align: right;">Page 231</p> <p>1 Q. Okay. And so according to the Longhorn menu, that 2 is below what the standard Bar Code has for a 3 Manhattan, correct? 4 A. Yes. 5 Q. Okay. It's well below, about 40 percent below, 6 correct? 7 MR. FARRAH: Objection. 8 A. If the math figures that way, sure. 9 MR. FARRAH: Mark that. 10 (Exhibit No. 8, Page 68 of Bar Code, 11 marked for identification.) 12 MR. GILLIS: I just want to put on the 13 record we're paying for one deposition. 14 If we continue it, I'm not paying another 15 \$1200 for a second day, because he said he 16 had -- strike it. 17 Q. What's your fee for a deposition? 18 A. 1250. 19 Q. Okay. 20 MR. GILLIS: So the fact that you want to 21 leave today and come back later, that's fine, but 22 we're still paying for one deposition. 23 MR. FARRAH: And that's fine. I just 24 want you to know that I'll have some questions for</p>	<p style="text-align: right;">Page 234</p> <p>1 ERRATA SHEET 2 PAGE LINE DESCRIPTION 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>

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1 CERTIFICATE
2 COMMONWEALTH OF MASSACHUSETTS)
) ss.
3 COUNTY OF MIDDLESEX)
4 I, Kathryn R. Sweeney, a Registered
5 Professional Reporter, Certified Realtime Reporter
6 and Notary Public within and for the Commonwealth
7 of Massachusetts, do hereby certify:

8 That MICHAEL A. MARCANTONIO, the witness
9 whose deposition is hereinbefore set forth, was by
10 me satisfactorily identified by his Massachusetts
11 driver's license and duly sworn, and that the
12 foregoing transcript is a true record of the
13 testimony of said witness.

13 testimony of said witness.
14 I further certify that I am not related to
15 any of the parties in this matter or their counsel
16 by blood or marriage, and that I am in no way
17 interested in the outcome of said cause.

18 Dated this 7th day of March, 2007, at Acton,
19 Massachusetts.

22 KATHRYN R. SWEENEY
NOTARY PUBLIC

MY COMMISSION EXPIRES:
April 27, 2012

Page 1

Volume: II
Pages: 1-119
Exhibits: None

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS SHE IS *
THE ADMINISTRATRIX OF THE ESTATE OF *
AWILDA SANTIAGO, ESSEX PROBATE COURT *
#03P-2499AD1, P/P/A VERONICA ROSARIO *
AND CHRISTINA SANTIAGO, AND AS SHE IS *
THE ADMINISTRATRIX OF THE ESTATE OF *
JOSE SANTIAGO, BERLIN (CONNECTICUT) *
PROBATE COURT, CASE #03-0713 *
Plaintiff, *

VS

RARE HOSPITALITY INTERNATIONAL, INC. *
d/b/a LONGHORN STEAKHOUSE, *
Defendant *

DEPOSITION OF KRISTIN O'DONNELL, a witness

called on behalf of the Plaintiff, taken pursuant to
Notice under the applicable provisions of the Federal
Rules of Civil Procedure, before Barbara J. Simon, a
Professional Shorthand Reporter and Notary Public, in
and for the Commonwealth of Massachusetts, at the law
offices of Albert L. Farrah, Jr., One Washington
Mall, Boston, Massachusetts, on Wednesday, December
28, 2005, commencing at 11:05 a.m.

SHEA COURT REPORTING SERVICES
(617) 227-3097

Page 2

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WITNESS DIRECT CROSS REDIRECT RECROSS
KRISTIN O'DONNELL
(By Mr. Farrah) 4

EXHIBITS

There are no exhibits.

PROCEEDINGS

KRISTIN O'DONNELL, having been previously
satisfactorily identified and duly sworn, on oath,
deposes and says as follows:

DIRECT EXAMINATION

BY MR. FARRAH:

Q. You're still under oath. If I cover old ground, it's
not because I mean to. I'm going to try to move
forward.

Let me start by asking you, on the evening of
September 26, 2003, do you recall having a
conversation with Leigh Chabot about the Jack Daniels
Manhattans that she had ordered from you?

A. Yes.

Q. And did you ask Leigh about that table?

A. Yes.

Q. What did you ask her about the table?

A. I just wanted to make sure that they were eating
dinners.

Q. Did you say to her, in effect, "Are these people
eating food?"

A. Yes.

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1 MR. FARRAH: I don't have the day of your
2 deposition. If you'll excuse me, I'll just get that.
3 (Off the record.)
4 Q. Why were you concerned about whether they were
5 eating?
6 A. It was just that it's typical procedure for myself
7 and most good bartenders just to check after a second
8 round of drinks, just to make sure that they're
9 eating.
10 MR. FARRAH: You're not going to believe this,
11 but I need to get up one more time.
12 (Off the record.)
13 Q. Do you know whether or not you asked her about that
14 table and whether it was eating when the first order
15 for Jack Daniels Manhattans came in?
16 A. No.
17 Q. According to Exhibit 11, that order was placed at
18 8:40 p.m. Do you see that?
19 A. Yes.
20 Q. And is it accurate to say that information about food
21 or appetizers ordered by a table is not transmitted
22 to the service bar with the request for drinks?
23 A. That's correct.
24 Q. Do you know whether or not you had the conversation

1 Q. What was it about that order that prompted the
2 conversation?
3 A. Just that it was the second full round of drinks.
4 Q. Okay. Was there anything else about that order that
5 prompted that conversation that you can think of now?
6 A. No.
7 Q. And do you know whether or not you had a conversation
8 with Leigh Chabot when you received notification of
9 the 9:24 p.m. order for three Jack Daniels
10 Manhattans?
11 A. No.
12 Q. Do you have a memory of having a conversation with
13 her about the 9:24 p.m. order?
14 A. No.
15 Q. Okay. Did you ask Leigh Chabot about the patrons at
16 that table because the patrons at that table were
17 loud that evening?
18 A. No.
19 Q. Did you ask her about the patrons at that table
20 because someone had told you that they were loud that
21 evening?
22 A. No.
23 Q. Could you hear them during the evening?
24 A. No.

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Page

1 with her about whether that table had ordered food at
2 8:51 p.m. or in connection with the 8:51 p.m. order
3 that is shown on Exhibit 11?
4 A. I would say no.
5 Q. You don't know or you didn't?
6 A. I don't recall exactly but the second round of
7 drinks, I would not have questioned the second round
8 of drinks.
9 Q. Can we agree that the second round of drinks, at
10 least as it is shown on Exhibit 11, is for seven Jack
11 Daniels Manhattans?
12 A. Correct.
13 Q. It's your best memory that that didn't prompt the
14 conversation you had with Leigh Chabot; is that
15 right?
16 A. Yes.
17 Q. Do you know whether the conversation you had with
18 Leigh Chabot was prompted by what is shown on
19 Exhibit 11 as the 9:21 p.m. order of some Jack
20 Daniels Manhattans?
21 A. Yes.
22 Q. Is it your best memory that that was the order that
23 prompted the conversation?
24 A. Yes.

1 Q. Could you see them during the evening?
2 A. I could see down to that table from the back.
3 Q. From time to time?
4 A. Yes.
5 Q. Is it accurate to say that you were very busy that
6 evening?
7 A. I would say it was a regular Friday night busy crowd.
8 Q. Flat out?
9 A. I don't recall if I was pulling my hair out, but most
10 Friday nights were busy.
11 Q. Nonstop?
12 MR. GILLIS: Objection.
13 A. I don't recall.
14 Q. Were you surprised at the number of drinks that was
15 ordered by that table during the evening?
16 A. No, not for a large party.
17 Q. Did you know how many people were in that party that
18 evening?
19 A. At least as many as drinks were being ordered.
20 Q. Seventeen Jack Daniels Manhattans were ordered that
21 evening; is that right?
22 A. Yes.
23 Q. How many people were in that party?
24 A. However many the most round contained would be the

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1 minimum number because only one drink would go to
2 each person.

3 Q. But that's a guess on your part, isn't it, as to how
4 many people were in the party?

5 A. Yes. That would be better for Leigh to answer.

6 Q. Fair enough. Are you also aware that two
7 twenty-five-ounce Budweiser sport beers were served
8 to that table that evening?

9 MR. GILLIS: Objection.

10 A. What do you mean by "sport"?

11 Q. That's what they're called, Longhorn sport beers.

12 A. I'm not familiar with that term.

13 Q. Are you also aware that two twenty-five-ounce beers
14 were served to that table that evening?

15 A. Yes.

16 Q. Did you have a conversation with Leigh Chabot about
17 those beers?

18 A. No.

19 Q. Do you know who those beers were for, what patron at
20 that table those beers were for?

21 A. No.

22 Q. Did you have any conversation during that evening,
23 while you were making drinks, with anyone else about
24 that table? This is the evening of 9/26.

1 A. Yes.

2 Q. What did you say to him about that table?

3 A. I just asked if he had been by the table yet.

4 Q. Been by the table?

5 A. Yes.

6 Q. What did he say?

7 A. He said, "Yes, and everyone seems fine."

8 Q. And why did you ask him if he had been by the table?

9 A. It's Longhorn practice for managers to go and check
10 on every table throughout the night. They walk
11 around to make sure the meals come out okay, how the
12 service is, if they can get anything.

13 Knowing that, I wanted to see if he had been by,
14 just to get a second opinion.

15 Q. Did you ask Mr. Noonan if he had been by all the
16 other tables that night?

17 A. I did not.

18 Q. Was Table 52 the only table about which you asked
19 Mr. Noonan whether he had been by that night?

20 A. Yes, as far as I recall.

21 Q. Was it your practice to ask the manager if he had
22 been by each of the tables during the nights that you
23 worked as a service bartender?

24 A. No.

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1 A. I did ask the manager if he had been by the table as
2 well.

3 Q. Did you speak to the manager about that table before
4 or after you spoke to Leigh about the table?

5 A. After.

6 Q. And can you tell me how long after you spoke to Leigh
7 it was that you spoke to the manager about that
8 table?

9 A. I don't recall exactly how long.

10 Q. Was it a matter of minutes as opposed to seconds?

11 MR. GILLIS: Objection.

12 A. I would say anywhere between ten minutes to fifteen
13 minutes.

14 Q. After you spoke to Leigh about the table; is that
15 right?

16 A. Yes.

17 Q. It was ten to fifteen minutes after you spoke to
18 Leigh about the table that you spoke to the manager
19 about the table; is that right?

20 MR. GILLIS: Objection.

21 A. As far as I recall, yes.

22 Q. Was it Mr. Noonan that you spoke to?

23 A. Yes.

24 Q. As best as you can recall; is that right?

1 Q. So what was it about Table 52 that prompted you to
2 ask Mr. Noonan if he had been by the table that
3 night?

4 A. Just that they were ordering Manhattans.

5 Q. An excessive amount of Manhattans, in your opinion?

6 MR. GILLIS: Objection.

7 A. No.

8 Q. Was there something about the Manhattans that
9 prompted you to ask Mr. Noonan if he had been by the
10 table?

11 A. No. I just wanted to make sure that they had eaten
12 because that had been my training.

13 Q. But Leigh Chabot had already told you that they had
14 ordered food.

15 A. Yes.

16 Q. Did you not believe her?

17 MR. GILLIS: Objection.

18 A. No.

19 Q. You could see the table from where you were, couldn't
20 you?

21 A. Yes.

22 Q. And you could see that there was food on the table
23 after you spoke to Leigh Chabot; isn't that right?

24 A. I wouldn't say that I could see that far. My eyes

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1 are not that good.
 2 Q. You wear contact lenses?
 3 A. I do. Even with them, I still -- I could see people
 4 at the table but --
 5 Q. How far from where you were standing at the service
 6 bar were you from the nearest point of Table 52 that
 7 night?
 8 A. I would say probably the length of this room and
 9 maybe a quarter more to a half.
 10 Q. How long is this room?
 11 A. I have no idea.
 12 Q. You're not good at estimating distances?
 13 A. No.
 14 Q. Is it your testimony that you could not see whether
 15 they were eating food that night at Table 52?
 16 A. Correct.
 17 Q. And that is because your vision is so bad that even
 18 if there were food at that table, you would not have
 19 been able to see it; is that right?
 20 MR. GILLIS: Objection.
 21 A. No; the distance of it and the angle of the table.
 22 You could see people at the table, but as far as
 23 seeing over people's backs and onto the table.
 24 Q. But Leigh Chabot had told you that they had ordered

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1 food; isn't that right?
 2 A. Yes.
 3 Q. And it was not anything that anyone at the table said
 4 that prompted you to ask Mr. Noonan to take a look at
 5 the table; is that right?
 6 A. Correct.
 7 Q. Did you ask him to take a look at the table or
 8 whether he had been by the table already?
 9 A. If he had been by the table, as far as I recall.
 10 Q. Are you sure you didn't ask him to take a look at the
 11 table for you -- check on the table?
 12 A. I can't say for certain.
 13 Q. You don't remember really, do you?
 14 A. I remember asking him about the table.
 15 Q. And that's because the table was loud?
 16 A. No.
 17 Q. That's because Jack Daniels Manhattans had been
 18 ordered by that table?
 19 A. Yes.
 20 Q. Could you at least tell from where you stood -- I
 21 assume you were standing while you were working at
 22 the service bar.
 23 A. Yes.
 24 Q. Could you at least tell from where you stood in the

Page 1

1 service bar the sexes of the people who were at the
 2 table?
 3 MR. GILLIS: Objection.
 4 Q. Male or female?
 5 A. I don't recall specifically that table because it
 6 would not be my practice to take that into account.
 7 Q. As you sit here today, do you know the sexes of the
 8 people who sat at that table?
 9 A. I honestly don't know if there were any woman at the
 10 table. From what I gather, it was all men.
 11 Q. What is the basis for that gathering?
 12 A. Just from what I heard through the criminal trial and
 13 here in this deposition.
 14 Q. But you were at the criminal trial for a very brief
 15 period of time; isn't that right?
 16 A. Yes.
 17 Q. Just long enough to testify; isn't that right?
 18 A. Yes.
 19 Q. Could you tell from your vantage point in the bar
 20 whether there were any children at that table?
 21 A. I could not tell.
 22 Q. What did the manager say to you about the table that
 23 night?
 24 A. That they were fine.

Page 1

1 Q. And did you see him go over to the table?
 2 A. I did not.
 3 Q. How long after you first spoke to him about the table
 4 was it that he told you that they were fine?
 5 A. I don't recall.
 6 Q. Is it accurate to say you had two conversations with
 7 him -- one where you asked him to go look at the
 8 table and the other when he came back and reported
 9 what he had seen at the table?
 10 MR. GILLIS: Objection.
 11 A. I don't recall that.
 12 Q. You don't know whether you had one conversation or
 13 two conversations; is that right?
 14 A. Right.
 15 Q. Did you ask him to go to the table because you were
 16 concerned about the amount of Jack Daniels Manhattans
 17 that had been delivered to the table?
 18 MR. GILLIS: Objection.
 19 A. No. I just wanted to make sure that they had been
 20 eating food with them.
 21 Q. Because?
 22 A. My training had always been to make sure that people
 23 are eating when they're drinking, to serve food.
 24 Q. And you cannot tell us, if you had more than one

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Page 1

1 conversation, when you had the first conversation
2 with Mr. Noonan about that table except to say that
3 it was after you had the conversation with Leigh
4 Chabot?

5 A. Correct.

6 Q. And you think it may have been as much as ten or
7 fifteen minutes after that conversation?

8 A. It may have been. I don't recall.

9 Q. Did you speak to Patty that night about Table 52 and
10 its patrons?

11 A. No.

12 Q. Are you sure?

13 MR. GILLIS: Objection.

14 A. I don't recall exactly, but I cannot imagine that I
15 would have.

16 Q. Why not?

17 A. Because she had no contact with them. Leigh was the
18 one that was waiting on them. So she would have been
19 able to answer my question.

20 Q. But Patty was the person that you had a conversation
21 with some date after September 26, 2003 in which she
22 referred to that table; isn't that right?

23 MR. GILLIS: Objection.

24 A. Yes.

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Page 2

1 Q. You remember testifying to that?

2 A. Yes.

3 Q. The first day?

4 A. Yes.

5 Q. And you've seen your deposition transcript from the
6 first day, haven't you?

7 A. Yes.

8 MR. GILLIS: Objection. What are you referring
9 to? What page?

10 MR. FARRAH: This is why I love the
11 manuscript -- page 62.

12 MR. GILLIS: The line he is referring to --

13 MR. FARRAH: We start on the bottom of page 61.

14 MR. GILLIS: What was the question again?

15 Q. My question was, Patty had referred to that table,
16 but more accurately, Patty had said to you, "Do you
17 remember that group of guys?"

18 MR. GILLIS: So the question is there was no
19 talk about the table, just that group of guys; is
20 that your question?

21 MR. FARRAH: Yes.

22 Q. Do you remember testifying on December 8 that Patty
23 had a conversation with you after September 26, 2003
24 in which she asked you, "Remember that group of

1 guys?"

2 A. Yes.

3 Q. Do you remember that?

4 A. Yes.

5 Q. And you knew when she said that to you, sometime
6 after September 26, 2003, what group of guys she was
7 referring to; isn't that right?

8 A. Yes.

9 Q. Now, my question is, what was it about that group of
10 guys that made you know, when Patty spoke to you
11 sometime after September 26, 2003, which group of
12 guys she was referring to?

13 A. Perhaps I did say something to her that night or she
14 overheard me saying something to Leigh or something
15 to the manager. I don't recall specifically.

16 MR. GILLIS: Don't guess.

17 A. I don't know.

18 Q. But as you sit here, even today, you remember that
19 group of guys at the restaurant on September 26,
20 2003; isn't that right?

21 A. I don't remember that group. I just remember the
22 drink ticket. I didn't wait on them.

23 Q. You remember Patty saying to you a few days later,
24 "Remember that group of guys"; isn't that right?

1 A. I believe that's what she said.

2 Q. Do you remember what she said to you about that group
3 of guys on September 26, 2003?

4 A. That she heard there was an accident.

5 Q. No. Do you remember what she said to you about that
6 group of guys on September 26, 2003?

7 A. No, I don't.

8 Q. Do you remember any conversation with her the night
9 the Manhattans were served about that group of guys?

10 A. No.

11 Q. But as you sit here now, you may have had a
12 conversation with her that night about that group of
13 guys; isn't that right?

14 MR. GILLIS: Objection.

15 A. I don't recall.

16 Q. How about Sherri Salmond? Did you have a
17 conversation with her that night about the patrons at
18 Table 52?

19 A. I don't recall.

20 Q. Do you know that you did not have a conversation with
21 her that night about Table 52?

22 MR. GILLIS: Objection.

23 A. I don't know.

24 Q. You don't know?

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1 A.No.

2 Q.So you may have had a conversation with her that
3 night; is that right?

4 MR. GILLIS: Objection.

5 A.I worked with her. I'm sure we talked about a lot of
6 things, but I don't recall.7 Q.And Sherri Salmond had what job at the restaurant
8 that night?

9 A.Waitress.

10 Q.Is she a friend?

11 A.We were friends when we worked together.

12 Q.Let's start with September 26, 2003. Do you remember
13 having any conversations with Sherri about Table 52?

14 A.Not that I remember.

15 Q.At any time after September 26, 2003, do you remember
16 having conversations with Sherri about the patrons of
17 Table 52?

18 A.I don't remember.

19 Q.No or you don't remember?

20 A.No, I don't remember.

21 Q.Did you ever write out a statement for anyone at all
22 about the events of September 26, 2003 at the
23 Longhorn Steakhouse?

24 A.No.

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1 Q.Did you ever speak to any employees of the Longhorn
2 Steakhouse about the events of September 26, 2003,
3 other than what you told me so far?

4 A.Yes.

5 Q.Who did you speak to about the events of September
6 26, 2003?7 A.I don't remember her name. It was someone on the
8 phone.

9 Q.From the Longhorn?

10 A.Yes.

11 Q.And when did you speak to her?

12 A.I don't recall. It was while I was still employed
13 there.14 Q.And did she identify herself as an employee of the
15 Longhorn?

16 A.Yes.

17 Q.And did she say why she was calling?

18 MR. GILLIS: I'm going to object and instruct
19 her not to answer.20 I don't know who she spoke to, and if it was
21 someone from the legal department, it could be
22 privileged information.23 She can identify the person, but I'm not going
24 to get into any of the detailed conversation.

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1 I'm going to let you ask her when she had the
2 conversation, who she spoke to, what their name
3 was -- that's fine, but as far as anything as to any
4 discussions between them, I think that's privileged,
5 and I am going to instruct her not to answer.6 MR. FARRAH: Let me ask you this. I asked her
7 when and who already.

8 MR. GILLIS: And that's why I have not objected.

9 MR. FARRAH: And she has not identified that
10 person as a member of the legal department or working
11 for the legal department.

12 MR. GILLIS: Solely because she doesn't know.

13 MR. FARRAH: Well, if you have a good faith
14 basis to state on the record that it's your belief
15 that that was a conversation she had with somebody
16 from the legal department, that's fine and I won't
17 press it.18 MR. GILLIS: I don't know of anybody at Longhorn
19 who has spoken to any of the people involved in this
20 case other than the legal department.21 MR. FARRAH: But let me ask some more questions.
22 I'm going to reserve my rights.

23 MR. GILLIS: That's fine.

24 Q.Did this woman ask you what happened that night?

Page 2

1 A.I honestly don't remember what we talked about.

2 Q.Were you surprised at the conversation, that she was
3 calling you?

4 MR. GILLIS: Objection.

5 A.No. She didn't call me. I called her. I was at
6 work.

7 Q.Did somebody ask you to call her?

8 A.Yes.

9 Q.Who?

10 A.My manager.

11 Q.Mr. Noonan or Mr. --

12 A.-- Bouillaine.

13 Q.Did he say why he wanted you to call her?

14 A.I don't recall. He could probably help you better
15 answer that.

16 Q.I want you to help me as much as you can today.

17 A.I'm trying.

18 Q.And you can't tell me when this was in relation to
19 September 26, 2003?

20 A.No.

21 Q.Was it before or after you had the conversation with
22 Patty about that group of guys?

23 A.I don't recall. I would say after.

24 MR. FARRAH: I'm still reserving my rights to

Page 25

1 inquire into this conversation, although it seems she
2 doesn't remember anything that happened in the
3 conversation.
4 Q. Mr. Bouillaine, did he say why he wanted you to call
5 this woman?
6 A. I don't recall.
7 Q. Had Mr. Bouillaine asked you about what had happened
8 the night of September 26, 2003 by that time?
9 A. I'm not sure.
10 Q. Were you concerned that one or more of the patrons at
11 Table 52 was becoming intoxicated that night?
12 MR. GILLIS: What time period?
13 Q. When you were serving the drinks to Leigh Chabot,
14 were you concerned?
15 MR. GILLIS: Which round? The first one or the
16 second one?
17 Q. At any time that night, were you concerned that one
18 or more of the patrons at that table was becoming
19 intoxicated?
20 A. No. Both Leigh and my manager had been by and spoken
21 with them, so no.
22 Q. Did you perform any calculations in your mind of the
23 amount of alcohol that was being delivered to that
24 table that night?

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1 A. No.
2 Q. Did you perform any calculations in your mind about
3 the effect of the alcohol that was being delivered to
4 that table that night on one or more of the patrons?
5 A. No.
6 Q. Did you try to estimate in your mind how much alcohol
7 you had served that table through Leigh Chabot that
8 night?
9 A. No.
10 Q. Do you know who at the table consumed what alcoholic
11 beverages that were delivered by Leigh Chabot to the
12 table?
13 A. No.
14 Q. Did the Longhorn have any procedure in place, as of
15 September 26, 2003, for keeping a record of how much
16 alcohol had been delivered to a particular table?
17 A. No, not that I know of.
18 Q. Were there any policies in place as of September 26,
19 2003 that you were familiar with at the Longhorn as
20 to the maximum amount of alcohol that could be
21 delivered to any particular patron while at the
22 Longhorn?
23 A. One drink per person at one time.
24 Q. Were there any other procedures in force, as of

Page 2

1 September 26, 2003, that related to the maximum
2 amount of alcohol that could be delivered to any
3 patron at the Longhorn?
4 MR. GILLIS: In addition to the --
5 MR. FARRAH: One drink per person.
6 MR. GILLIS: In addition to all the training
7 stuff that she talked about in the first half of her
8 deposition?
9 MR. FARRAH: Sure, in addition to that.
10 A. No.
11 Q. Are you familiar with the concept of green zone,
12 yellow zone and red zone as it relates to service of
13 alcoholic beverages to customers?
14 A. Yes.
15 Q. Did you, at any time during that evening, seek to
16 estimate in what zone any of the patrons at Table 52
17 was, based solely upon the amount of alcoholic
18 beverages that were served by Leigh Chabot through
19 you to the table?
20 A. By inquiring as to whether they had eaten food or
21 not, yes.
22 Q. Did you undertake any other effort to determine in
23 what zone -- green, yellow or red -- any of the
24 patrons was at any particular time that evening,

Page 2

1 based solely upon the amount of alcoholic beverages
2 that were delivered to the table by Ms. Chabot?
3 A. No.
4 Q. Was there any requirement in place, other than all
5 the training materials that Mr. Gillis mentioned
6 earlier and you talked about during your first day of
7 your deposition, was there any requirement in place
8 that you were aware of at the Longhorn, as of
9 September 26, 2003, that servers undertake to
10 estimate, based on solely the amount of alcohol that
11 they had served to a particular patron, in which what
12 zone -- red, yellow or green -- that patron was at
13 any particular time while at the Longhorn?
14 MR. GILLIS: Any patron she served?
15 MR. FARRAH: Any patron.
16 MR. GILLIS: I object. You're assuming there's
17 one policy.
18 Are you asking about a policy for bartenders for
19 tables or for bartenders serving people at the bar?
20 Q. The policy doesn't matter, does it -- Longhorn's
21 policy?
22 A. Can you repeat the question?
23 MR. FARRAH: Why don't we have the question read
24 back?

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1 (Court reporter reads back question.)
 2 MR. GILLIS: I object.
 3 A. No.
 4 Q. The Jack Daniels Manhattans that you made for Leigh
 5 Chabot that night, were they straight up, or on the
 6 rocks, or don't you know?
 7 A. Straight up.
 8 Q. And you have a memory of that; is that right?
 9 A. Yes.
 10 Q. And you free-poured those; isn't that right?
 11 A. Correct.
 12 Q. Did you follow Longhorn's procedure with respect to,
 13 first, the vessel into which the drinks were served
 14 to the patrons?
 15 A. What do you mean by "vessel"?
 16 Q. I had to say "vessel." I just felt like saying
 17 "vessel."
 18 A. Is that the word we were not sure of last time?
 19 Q. I'm showing you Exhibit 4 from the first day of your
 20 deposition, which, for the record, is the Bar
 21 Operations Manual. Do you remember that document?
 22 A. Yes.
 23 Q. And on the page which we have Bates stamped Rare
 24 05271, bar glassware is described. Do you see that?

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Page 3

1 A. Yes.
 2 Q. What I want to know is, did you give to Leigh Chabot
 3 the Jack Daniels Manhattans straight up in a
 4 six-ounce cocktail glass, as is shown on this page of
 5 Exhibit 4?
 6 MR. GILLIS: Objection.
 7 A. Yes.
 8 Q. Is there any question in your mind about that?
 9 A. No.
 10 Q. Okay. You didn't serve those Jack Daniels Manhattans
 11 in the fourteen-ounce cobalt-blue-rimmed martini
 12 glass, did you?
 13 A. No. That was only for Margaritas.
 14 Q. Do you have any explanation as to why in the Longhorn
 15 bar manual it is referred to as a martini glass?
 16 A. I believe because of the shape and the design.
 17 Q. That's your guess?
 18 A. No. That would be exact. It says here as well --
 19 specialty shaker Margaritas. We would never serve a
 20 martini in those.
 21 Q. How far from the lip of the glass -- the Manhattan
 22 glass -- was it that you poured the drinks, the
 23 Manhattans?
 24 A. An inch below, and once the cherry goes in, it brings

1 it up so the customers think they're getting more.
 2 Q. Can we agree that the drink-making techniques portion
 3 of Exhibit 4 to your deposition on page 298 requires
 4 that all drinks be one-quarter inch from the lip of
 5 the glass?
 6 A. Yes.
 7 Q. Is that what you did?
 8 A. Once the cherry goes in it, it brings it up to about
 9 a quarter inch.
 10 Q. And you put one cherry in each glass of the Jack
 11 Daniels Manhattans; is that right?
 12 A. Yes.
 13 Q. Describe for me how you filled the first order for
 14 Jack Daniels Manhattans that Leigh presented you
 15 with, which according to Exhibit 11 was for three
 16 Jack Daniels Manhattans, placed at 8:40.
 17 MR. GILLIS: Objection. Did you say that she
 18 served?
 19 MR. FARRAH: No; that Leigh served.
 20 MR. GILLIS: I don't think there's any evidence
 21 that the first round was the round that she served.
 22 I don't think there's any evidence that she said
 23 she served that first round.
 24 Q. Let me back up. According to Exhibit 11, Leigh

1 placed an order for Table 52 for three Jack Daniels
 2 Manhattans at 8:40 p.m. Do you see that?
 3 A. Yes.
 4 Q. Do you agree with that, that that's what Exhibit 11
 5 shows?
 6 A. Yes.
 7 Q. Did you make that round of drinks?
 8 A. I don't recall.
 9 Q. Do you have any reason to believe you did not make
 10 that round of drinks?
 11 MR. GILLIS: Objection; asked and answered.
 12 A. I can't say for sure.
 13 Q. Do you know whether you made the round of drinks for
 14 seven Jack Daniels Manhattans which Leigh placed for
 15 Table 52 at 8:51 p.m.?
 16 A. Yes.
 17 Q. What is it about that order that leads you to know
 18 that you made that order?
 19 A. I just remember the drinks on the tray.
 20 Q. You remember seven drinks?
 21 A. Yes.
 22 Q. Had you ever made seven Jack Daniels Manhattans at
 23 one time for one table while you worked at the
 24 Longhorn, up to that point?

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1 A. No.

2 Q. Had you ever made Jack Daniels Manhattans straight up

3 for any customer up to that point while you worked at

4 the Longhorn?

5 A. Yes.

6 Q. Was it a drink you made often?

7 A. No.

8 Q. And when you worked at J.R.'s, is it accurate to say

9 that most of your customers were drinking beers?

10 A. Yes.

11 Q. On the night of September 26, 2003, was there any

12 Longhorn mandated procedure in place for keeping a

13 tally of the number of drinks that had been served by

14 the service bar to a particular table?

15 A. No.

16 Q. Was there any Longhorn mandated procedure in place,

17 as of September 26, 2003, that required communication

18 between the different bartenders as to how much each

19 bartender had made for service to a particular table?

20 MR. GILLIS: At the service bar?

21 MR. FARRAH: At the service bar, yes.

22 A. No, there was no set procedure.

23 Q. You're clear, if I understand your testimony right,

24 and I don't want to put words in your mouth, you're

1 A. No.

2 Q. Now, can you describe for me what you did when you

3 got ready to make the order for the seven Jack

4 Daniels Manhattans?

5 MR. GILLIS: If you remember.

6 A. I put the seven glasses on the tray and then took a

7 rocks glass and filled it with ice, and then put the

8 alcohol in and strained it in and did that seven

9 times, and then put a cherry in each drink, and then

10 put her ticket on top.

11 Q. Is that how you were trained to make a Jack Daniels

12 Manhattan?

13 A. Yes.

14 Q. Who trained you to make a Jack Daniels Manhattan tha

15 way?

16 A. Rebecca trained me at Longhorn.

17 Q. As far as you know, did Rebecca train you in making

18 the Jack Daniels Manhattans in accordance with the

19 Bar Operations Manual?

20 A. Yes.

21 Q. As far as you know, is the procedure that you just

22 described for making Jack Daniels Manhattans

23 straight-up the procedure that is described in the

24 Bar Operations Manual?

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1 clear that you made the seven straight-up Jack

2 Daniels Manhattans that were made at 8:51; is that

3 right?

4 A. Yes.

5 Q. You're unsure about whether it was you that made the

6 four Jack Daniels Manhattans that were ordered at

7 8:40; is that right?

8 A. Yes.

9 Q. In either event, was there any means -- any way --

10 for you to learn as of the time you made those seven

11 Jack Daniels Manhattans that four Jack Daniels

12 Manhattans had been ordered eleven minutes earlier?

13 A. Are you asking if I knew, if I had a means of knowing

14 that?

15 Q. Yes, if you had a means of knowing that.

16 A. No.

17 Q. Was there a computer in the service bar area that

18 provided you with that information?

19 A. No.

20 Q. Was there a policy in place at the Longhorn that

21 required service bartenders -- the various service

22 bartenders working on any particular night -- to

23 share with one another information about the drinks

24 that they had prepared for service to any table?

1 MR. GILLIS: Objection.

2 A. I don't recall.

3 Q. Have you ever made Jack Daniels Manhattans a

4 different way from the way you just described the way

5 you made those seven during that order?

6 A. Yes, at different places I've worked.

7 Q. Before or after the Longhorn?

8 A. Both.

9 Q. While you were at the Longhorn, did you ever make a

10 Jack Daniels Manhattan a different way from the way

11 that you described you made the seven that night?

12 A. No.

13 Q. And it's your understanding that the way you made the

14 seven that night is the way that the Longhorn manual

15 requires it be made?

16 A. As far as I recall, yes.

17 Q. After that night while you were at the Longhorn, did

18 you ever again make Jack Daniels Manhattans for

19 anyone?

20 A. I would believe so.

21 Q. Do you have a memory?

22 A. I can't say specifically, no.

23 Q. Did you in making the Jack Daniels Manhattans that

24 night, did you use what's called Manhattan mix?

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1 A. No.

2 Q. Can we agree that Exhibit 11 shows a charge for

3 Manhattan mix of fifty cents per Jack Daniels

4 Manhattan?

5 A. Yes. It's sweet Vermouth.

6 Q. Did you, in making the Jack Daniels Manhattans, use

7 sweet Vermouth?

8 A. Yes.

9 Q. How much did you put in each Jack Daniels Manhattan

10 during that first round of seven?

11 A. A quarter ounce, probably.

12 Q. How much Jack Daniels did you put in each drink that

13 you've described for that first round of seven?

14 A. It's a long time. Where I work now, they have bigger

15 martinis. I believe it was two ounces, an ounce and

16 a half.

17 MR. GILLIS: Don't guess.

18 A. I can't remember.

19 Q. Do you remember testifying in the criminal trial of

20 Mr. Southworth?

21 A. Yes.

22 Q. Do you remember testifying in the criminal trial of

23 Mr. Southworth that you put one ounce of Jack Daniels

24 in each of those Manhattans?

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1 A. I guess so.

2 MR. GILLIS: I don't want you to guess.

3 A. I don't recall.

4 MR. GILLIS: If you don't have an answer, don't

5 guess.

6 A. I don't recall.

7 Q. As you sit here today, all you know about how much

8 Jack Daniels you put in that round of seven was that

9 you filled the rocks glass with ice and then Jack

10 Daniels; is that right?

11 MR. GILLIS: Objection.

12 A. No.

13 Q. How much Jack Daniels did you put in each drink

14 during that round of seven that you remember making?

15 A. I don't recall what the Longhorn recipe was.

16 Q. So you don't have any memory, as you sit here, of how

17 much you put in; is that right?

18 MR. GILLIS: Objection.

19 Q. Of how much Jack Daniels you put in any drink; is

20 that right?

21 MR. GILLIS: Objection.

22 A. It's whatever is in the manual.

23 Q. By the way, how was the request made to you that the

24 drinks be straight up as opposed to on the rocks?

1 How was that communicated to you?

2 A. By the way they were rung in. It would say "rocks"

3 on the ticket if they wanted on the rocks.

4 Q. And when the request was communicated to you for the

5 Jack Daniels Manhattans, did it come to you as it

6 appears on this page of Exhibit 11, that is, Jack

7 Daniels and a Manhattan mix, or was it a Jack Daniels

8 Manhattan that was requested?

9 A. Jack Daniels Manhattan mix.

10 Q. As it appears in Exhibit 11; is that right?

11 A. Yes, without the prices.

12 Q. Do you know what a mixing glass is?

13 A. A glass you mix drinks in.

14 Q. Do you know what a mixing glass is as it's referred

15 to in the Bar Operations Manual of the Longhorn

16 Steakhouse, as it was in effect on September 26,

17 2003?

18 MR. GILLIS: Is that a particular page you're

19 referring to?

20 MR. FARRAH: Yes. It's Bates stamped 299.

21 Q. Take a moment and read that first part.

22 (Witness reviews document.)

23 Q. Do you see that procedure under "Stir and Strain" on

24 page 299 of Exhibit 4?

1 A. Yes.

2 Q. Is that the procedure you followed in making the

3 Manhattans that evening?

4 A. Yes, minus the stirring.

5 Q. Did you fill a mixing glass two-thirds with ice?

6 A. I filled a rocks glass with ice.

7 Q. That was your mixing glass; is that right?

8 A. Yes.

9 Q. And did you fill it two-thirds with ice?

10 A. No. I usually filled them with ice to the top.

11 Q. And do you have a memory of after pouring the drinks

12 from the glass in which you mixed them into the

13 individual glasses in which they were to be served

14 during that round of seven that we've been talking

15 about, whether or not -- and after putting the

16 cherries into each of the glasses -- whether or not

17 you added more bourbon to bring the level of the

18 liquid in any of the seven glasses to within

19 one-quarter inch of the lip?

20 A. No.

21 Q. Do you have a memory of having done that?

22 A. No.

23 Q. But it's your memory that they went out to the table

24 with the liquid one-quarter inch from the lip; is

Page 41

Page 4

1 that right?

2 MR. GILLIS: Objection. It's your memory, not
3 what your practice was.

4 A. No, I don't recall the exact measurement.

5 Q. We can agree, can't we, that the Longhorn Bar
6 Operations Manual called for the drinks going out,
7 that the liquid should be one-quarter of an inch
8 below the lip; is that right?

9 A. Yes.

10 Q. And that typically is what you tried to do; isn't
11 that right?

12 A. Yes, or it would be lower than that but never above.

13 Q. But you want to serve a good drink to the patron,
14 don't you?

15 MR. GILLIS: Objection.

16 A. Yes.

17 Q. The patron doesn't want to see the drink below the
18 level that other people are getting the drinks, does
19 he or she?

20 A. No.

21 Q. Now, at any time since you learned through the
22 conversation with Patty about that group of guys,
23 what happened the night of September 26, 2003, the
24 morning of September 27, 2003, have you tried to

1 conversation with Patty?

2 Q. Patty; I'm sorry. Had anybody spoken to you about
3 Southworth's criminal trial?

4 A. No.

5 Q. Did you know that he was charged with different
6 crimes?

7 A. No.

8 Q. What did Patty say to you about that group of guys,
9 best as you can recall it, when she had that
10 conversation with you?

11 A. That she had heard that there was some sort of
12 accident.

13 Q. Did she say anything else?

14 A. No.

15 Q. Did you think, at that point in time, that perhaps
16 one or more of the patrons at Table 52 was under the
17 influence of alcohol at the time that patron was
18 served his last drink?

19 MR. GILLIS: Objection.

20 A. No.

21 Q. At any time since Patty spoke to you about that group
22 of guys, have you considered whether or not any of
23 those guys became intoxicated while a customer at the
24 Longhorn?

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1 calculate in your mind the effects of the alcohol
2 that was served to that table on the different
3 patrons at that table?

4 A. No.

5 Q. Have you asked anyone to do that for you, other than
6 as part of the defense of this lawsuit?

7 A. No.

8 Q. Now, you were visited by a state trooper the night
9 before you testified -- I think it was last
10 September -- in the Southworth criminal trial; is
11 that right?

12 A. Yes.

13 Q. Had someone told you the state trooper was coming to
14 see you?

15 A. No.

16 Q. At what time of the day or night did the state
17 trooper arrive?

18 A. Night.

19 Q. Do you know what time?

20 A. It was very dark in September, so after 8:00.

21 Q. From the time you had the conversation with Sherri
22 until the state trooper arrived, had anybody spoken
23 to you about Southworth's criminal trial?

24 MR. GILLIS: Objection. Do you mean the

1 A. No.

2 Q. Do you know, as you sit here now, without
3 conversations with your counsel or people working for
4 your counsel, whether or not any of that group of
5 guys that Patty spoke to you about became intoxicated
6 while a customer at the Longhorn?

7 A. No.

8 Q. Do you believe that any of that group of guys became
9 intoxicated while a customer at the Longhorn?

10 A. No.

11 Q. Is it that you believe that they did not become
12 intoxicated while a customer at the Longhorn?

13 A. Yes.

14 Q. What is the basis for that belief?

15 A. I didn't see any visibly intoxicated customers
16 leaving that night, and they definitely would have
17 stuck out.

18 Longhorn is a family restaurant. It was not a
19 type of place where people were getting fall-down
20 drunk.

21 So I would definitely remember that, as well as
22 other servers would probably have been talking about
23 it.

24 Q. Is that what you were trained to look for in

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1 determining whether or not to serve a patron, whether
 2 the patron was fall-down drunk?
 3 MR. GILLIS: Objection.
 4 A. No.
 5 Q. Other than that nobody was fall-down drunk at that
 6 table at the time they were served their last drink,
 7 what is the basis for your belief that nobody became
 8 intoxicated while a customer at the Longhorn?
 9 MR. GILLIS: No one at the table, you mean?
 10 MR. FARRAH: That table, yes.
 11 A. Usually, we look for changes in behavior -- if
 12 someone seems quiet when they arrive and they become
 13 louder, or loud people get quiet, changes in
 14 language, changes in body movements. There's many
 15 signs, and you have to take each person case by case.
 16 Leigh would probably be better to answer that
 17 than I, but from my vantage point at the bar, I did
 18 not see anyone that I believe was intoxicated.
 19 Q. From your vantage point at the bar, you couldn't even
 20 see if they were eating or not; is that right?
 21 A. Yes, but I could see the door -- people coming and
 22 going.
 23 Q. What is the significance of that?
 24 A. If I noticed people leaving, if there was a group of

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1 people leaving.
 2 Q. What would you do? If that group had left and you
 3 noticed that, in your view, one or more of them was
 4 intoxicated, what would you have done?
 5 A. I would have had the manager go over to them and find
 6 out who was driving and make sure that no one that
 7 was intoxicated was driving.
 8 Q. Have you ever done that while you worked at the
 9 Longhorn?
 10 A. No. I never had to.
 11 Q. Was there any procedure in place, on September 26,
 12 2003, whereby the amount of alcohol that a patron
 13 consumed at the Longhorn was tracked?
 14 A. No.
 15 Q. Do you know whether or not any of the patrons at
 16 Table 52 was a patron at the bar before or after
 17 being seated at Table 52?
 18 A. No.
 19 Q. Have you heard from anyone, other than your attorneys
 20 or people working on behalf of your attorneys, that
 21 Jeffrey Southworth was a patron at the bar before he
 22 sat down at Table 52?
 23 A. No.
 24 Q. Was the state trooper male or female?

Page 4

1 A. Male.
 2 Q. When the state trooper came to your house, what did
 3 he say and what did you say?
 4 A. He asked if I still worked at Longhorn, and he asked
 5 me if I knew of anything that had happened, and I
 6 said I was unaware of any trial going on. I said I
 7 was no longer employed there.
 8 He asked me a few questions about the setup of
 9 the restaurant.
 10 Q. What did he ask you?
 11 A. He asked where the bar was in relation to the tables.
 12 Q. What else did he ask you?
 13 A. I don't recall much else.
 14 Q. Did he ask you if you saw Jeffrey Southworth under
 15 the influence of alcohol that night?
 16 A. I don't recall that.
 17 Q. Do you remember anything else that he asked you,
 18 other than whether you worked there that night and
 19 where the bar was in relation to the tables?
 20 A. He asked if I would be willing to testify because the
 21 D.A.'s office would be calling me.
 22 Q. And you said, "Of course"?
 23 A. Yes.
 24 Q. Good citizen that you are.

Page 4

1 A. Yes.
 2 Q. Did the D.A.'s office then call you that night?
 3 A. The next morning she called.
 4 Q. On the phone?
 5 A. Yes.
 6 Q. And what did she say and what did you say?
 7 A. She said that they needed me to testify, and I said,
 8 "Is there something I have to do today," meaning that
 9 Thursday.
 10 Actually, I think it was the Tuesday he might
 11 have come, and she called me the next morning because
 12 I wanted to make sure I didn't have class, and she
 13 told me what happened. Up to that point, I had no
 14 idea.
 15 Q. What did she say to you?
 16 A. She said that Mr. Southworth had been driving and a
 17 friend of his or someone called him and said that he
 18 had their keys, and he turned around on the highway
 19 to bring back the keys, and he hit this family --
 20 this father and daughters -- and I believe it killed
 21 two people -- and he went to a hotel.
 22 By the time the police found him, he was not
 23 intoxicated. So that was it.
 24 Q. Is it accurate to say that up to that point you did

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1 not know that one of that group of guys had been
2 involved in an accident where two people were killed?

3 MR. GILLIS: Objection.

4 A. Yes.

5 Q. All you can recall from your conversation with Patty
6 was that someone in that group of guys had been
7 involved in an accident?

8 A. Yes.

9 Q. And Patty had told you or you understood from the
10 conversation with Patty that that person had gone
11 home before being involved in the accident?

12 A. No. I don't recall anything specific like that.

13 Q. What else did the D.A. say to you during that phone
14 conversation?

15 A. That he was trying to say he was not driving the car,
16 and that I think they were actually trying to say
17 that they were never at Longhorn or the check was not
18 theirs or something like that.

19 Q. And what did you say during that conversation?

20 A. I said it was a long time ago, and she basically said
21 all they wanted from me was -- because Leigh was not
22 available -- if there was any way to ring in other
23 people's orders onto their table number.

24 They basically just wanted me to talk about the

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1 procedures for ringing in drinks.

2 Q. And do you remember reviewing any records with the
3 D.A. prior to the time that you testified?

4 A. Yes. I believe I saw things like this.

5 Q. You're talking about Exhibit 11?

6 MR. GILLIS: Which part of the exhibit?

7 THE WITNESS: This (pointing).

8 Q. That's the first page?

9 A. Yes. The first page I saw, and that's all I can
10 recall.

11 Q. Did the D.A. make you aware of the time frames of
12 when Jack Daniels Manhattans were delivered to the
13 table?

14 A. Not that I recall.

15 Q. What did she ask you to do, the D.A.?

16 A. They asked me to identify this as a check from
17 Longhorn and just explain to the court the system for
18 when a waitress punches in drinks, how they come up
19 to the service bar.

20 Q. Now, no one at Table 52 appeared visually intoxicated
21 to you at any time that night; is that right?

22 A. That I recall, yes.

23 Q. Are you sure?

24 A. Yes. Leigh would better answer that.

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1 Q. I understand. God willing, we're going to have Leigh
2 here at some point in time, but I'm asking you.

3 You're here now and you're under oath, and my
4 question to you is, did anyone at that table that
5 night, Table 52, appear visibly intoxicated to you?

6 A. No.

7 Q. Did anyone at that table, Table 52, appear to be
8 under the influence of alcohol that night?

9 A. Not that I know of.

10 Q. Have you ever wondered how anyone at that table could
11 not have been under the influence of alcohol that
12 night, given how much alcohol was delivered to that
13 table that night?

14 MR. GILLIS: Objection.

15 A. Obviously, they had drinks. I'm not saying they
16 didn't drink, but I don't think anybody was
17 intoxicated when they left Longhorn.

18 Q. Have you ever wondered how they could not have been
19 under the influence of alcohol, given how much was
20 served to that table that night?

21 MR. GILLIS: Objection. She already answered
22 that question.

23 A. No.

24 Q. Have you sat down and done the math to figure out how

Page 5

1 much alcohol was consumed by that table that night?

2 A. No.

3 Q. Do you know how much alcohol is in two ounces of Jack
4 Daniels?

5 MR. GILLIS: Are you talking the pure alcohol?

6 MR. FARRAH: Yes.

7 MR. GILLIS: He's not asking you two ounces of
8 alcohol. He's asking you have you done the
9 calculation on the percentage of alcohol, the proof
10 of Jack Daniels.

11 A. No, I have not done any of that.

12 Q. Were you trained to, as part of your training for
13 being a bartender at the Longhorn, were you trained
14 to do those calculations?

15 A. We were trained that the alcohol in a Manhattan is
16 the same as a four-ounce glass of wine or as a
17 twelve-ounce beer.

18 Q. Who gave you that training?

19 A. That's been everywhere including in Bar Code
20 training, but that was in my Longhorn training.

21 Q. You were trained at the Longhorn that the amount of
22 pure alcohol in a Jack Daniels Manhattan is the same
23 as in a four-ounce glass of wine; is that right?

24 A. Yes.

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1 Q. The amount of pure alcohol in a Jack Daniels
 2 Manhattan is the same as in a twelve-ounce beer; is
 3 that right?
 4 A. Yes.
 5 Q. Do you know how much pure alcohol is in a Jack
 6 Daniels Manhattan, other than it's the same as four
 7 ounces of wine?
 8 A. I don't.
 9 Q. Is it accurate to say that based on that training, on
 10 the night of September 26, 2003 you were comfortable
 11 that purely by virtue of the amount of alcohol served
 12 to that table that night no one was under the
 13 influence of alcohol?
 14 MR. GILLIS: Objection.
 15 A. What do you mean "under the influence"?
 16 Q. Do you understand the question?
 17 A. No, I don't. I'm not sure what you're asking me.
 18 Q. Let me put it in color zones for you.
 19 Is it accurate to say that based on your
 20 training, as you just described about to the relative
 21 amounts of alcohol in different drinks, that you were
 22 confident that evening that based on the number of
 23 drinks served to the patrons of that table, none of
 24 the patrons at that table at the time of the service

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1 of the last drink to that table was in the red zone?
 2 MR. GILLIS: Objection.
 3 A. No one was in the red zone, to my recollection.
 4 Q. You're confident of that; is that right?
 5 A. Yes.
 6 Q. And you're confident of that not based on what you
 7 saw; you're confident on that based on your
 8 calculations of how many drinks were delivered and
 9 the alcoholic content of those drinks; is that right?
 10 MR. GILLIS: Objection.
 11 A. No. I told you I didn't calculate that.
 12 Q. Weren't you trained to calculate the effect of drinks
 13 on customers passing from one zone to the other?
 14 MR. GILLIS: Objection. Are you asking her did
 15 she calculate that or did she use her training to go
 16 from one zone to the other -- the amount of alcohol
 17 someone had as opposed to the actual pure alcohol in
 18 one drink?
 19 Q. Let me ask you this. I'll withdraw those earlier
 20 questions.
 21 At any time prior to September 26, 2003, were
 22 you trained by the Longhorn to estimate the zone that
 23 a particular customer was in at the time a drink was
 24 served to that customer based on what you knew that

Page 5

1 customer had consumed, while at the Longhorn
 2 restaurant previously, in alcoholic beverages.
 3 MR. GILLIS: Under what circumstances?
 4 MR. FARRAH: Let's just see if she was trained.
 5 MR. GILLIS: You can't answer that question
 6 without knowing weight, food. What are you asking?
 7 It's a question you cannot answer in that form.
 8 MR. FARRAH: You're not testifying; you know
 9 that.
 10 MR. GILLIS: Ask a question she can answer.
 11 MR. FARRAH: Could you read the question back,
 12 please?
 13 (Court reporter reads back question.)
 14 MR. GILLIS: Objection to that question in that
 15 form.
 16 A. It doesn't seem clear to me.
 17 Q. Tell me what you were trained about red, green and
 18 yellow zones prior to September 26, 2003 as an
 19 employee of the Longhorn.
 20 A. I would use that when I was serving people directly.
 21 Q. What were you trained is my question.
 22 A. To take into consideration each person on a case by
 23 case basis that came into the bar -- what they ate,
 24 what they were drinking, their individual behaviors,

Page 5

1 speech; things like that.
 2 So whoever was directly serving people would do
 3 that. The waitresses were responsible for that at
 4 their own tables.
 5 Q. The only question to you is, were you trained at any
 6 time prior to September 26, 2003 by the Longhorn to
 7 estimate the zone a patron was in at the time of the
 8 service of a drink to that patron based upon what you
 9 knew about the alcoholic beverages that patron had
 10 consumed previously that day while at the Longhorn?
 11 MR. GILLIS: Her directly or her at the service
 12 bar?
 13 Q. Were you trained?
 14 A. Yes, I was trained.
 15 Q. What were you trained to do?
 16 A. As I said previously, to take each person case by
 17 case and what they were drinking, what they were
 18 eating; everything -- their size, their mannerisms,
 19 their speech.
 20 Q. By the way, I want to ask you this question again
 21 because it's a little unclear to me. You see
 22 Exhibit 5, the Bar Code Server Guide?
 23 A. Yes.
 24 Q. Am I correct that you did not receive that server

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1 guide from Longhorn as of September 26, 2003?

2 MR. GILLIS: Objection.

3 A. We had them in the building and behind the bar, but I

4 was not personally handed a copy.

5 Q. You were personally handed a copy of the server guide

6 in December of 2003; is that right?

7 A. Yes.

8 Q. Were you handed a copy of the server guide, which has

9 been marked as Exhibit 5, prior to December of 2003?

10 A. No.

11 Q. Do you have a memory, as you sit here, as of

12 September 26, 2003 of ever having read the server

13 guide or a copy of the server guide which has been

14 marked as Exhibit 5 to your deposition as of the time

15 you were working in the service bar?

16 A. Yes.

17 Q. Can you tell me the context in which you read the

18 server guide which has been marked as Exhibit 5, or a

19 copy thereof, prior to September 26, 2003?

20 A. I just read it a few times at work.

21 Q. The whole thing?

22 A. No. I would just read bits and pieces, here and

23 there.

24 Q. Skim it?

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1 A. No; read, when it was slow.

2 Q. Do you remember what portions of Exhibit 5 you had

3 read prior to September 26, 2003?

4 A. I don't recall.

5 MR. FARRAH: By the way, should we take a brief

6 break for lunch and then resume?

7 MR. GILLIS: Off the record for a second.

8 (Discussion off the record.)

9 (Luncheon recess.)

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1 AFTERNOON SESSION

2

3 Q. I want to show you Exhibit 5. It's the server guide.

4 I'd like to refer you to the page Bates stamped Rare

5 0519 and then 20, and then ask you to take a moment

6 or two to look at them.

7 (Witness reviews document.)

8 Q. My question to you is, as of September 26, 2003, had

9 anybody at Rare required that you review those two

10 pages of Exhibit 5?

11 A. No.

12 Q. My next question to you is, do you have a memory of,

13 at any time prior to September 26, 2003, actually

14 reviewing the pages Bates stamped 19 and 20 of

15 Exhibit 5?

16 A. Yes.

17 Q. And do you know for what purpose you undertook that

18 review?

19 A. Just my own, just reading it myself.

20 Q. Do you know when you undertook that review?

21 A. I don't.

22 Q. Okay. That's all I have on that.

23 I wanted to ask you some questions about page 2

24 of Exhibit 11 and subsequent pages of Exhibit 11.

1 My first question is with respect to the entry

2 at 7:59 p.m., "logout." Do you see that?

3 A. Yes.

4 Q. Do you know what "logout" means in the context of

5 this document?

6 A. Closing the screen when you're done ordering so the

7 next person can put their number in.

8 Q. Am I correct that "login" means opening the screen?

9 A. Yes.

10 Q. At 8:10 p.m. there is a reference to "cleared items."

11 Do you know what that means?

12 A. It appears to be a voided item.

13 Q. Is that what you understand "cleared items" to mean?

14 A. Yes.

15 Q. 8:10 p.m., "order items," does that mean what it

16 sounds like it means?

17 A. Yes.

18 Q. At 8:10, "print check." What does that mean?

19 A. Prints the check.

20 Q. For delivery to the customer?

21 A. It could be or it could be for her own purpose. I

22 can't speak for why Leigh printed that.

23 Q. But during those times that you worked as a server,

24 did you have the opportunity to print a check at any

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1 time even though, for example, the customers at the
 2 table were not finished?
 3 A. Yes.
 4 Q. And when we're talking about a "check," are we
 5 talking about a check that could be handed to the
 6 customers?
 7 A. Yes.
 8 Q. At 8:16 p.m. we've got "apply payment." What does
 9 that mean?
 10 A. Paying on a tab.
 11 Q. Paying off a tab; is that what you said?
 12 A. Applying payment to the check.
 13 Q. At 8:17 p.m. we've got "print check," an entry for
 14 "print check." Do you see that?
 15 A. Yes.
 16 Q. Further down on that line it says "printed two
 17 times." Do you see that?
 18 A. Yes.
 19 Q. What does that mean, if you know?
 20 A. It printed twice.
 21 Q. Do you know why the check printed twice?
 22 A. It may be that it's a credit card, and one's the
 23 merchant copy and one is the customer copy.
 24 Q. In your experience as a waitress, if it was a credit

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1 card and one was the merchant copy and one was the
 2 customer copy, would the check print twice?
 3 A. Yes. It's two separate slips.
 4 Q. "Close check" means what?
 5 A. Close the check.
 6 Q. That means that that table is done?
 7 A. Yes.
 8 Q. "Adjust payment" at 8:27. Do you see that?
 9 A. Yes.
 10 Q. What does that mean?
 11 A. Putting the tip on.
 12 Q. Because at 8:16 there was no tip, and then at 8:27
 13 there was a tip for \$12. Does that seem to be what
 14 it says?
 15 A. Yes.
 16 Q. Could we turn to the next page? Now, I'm talking
 17 around the time of September 26, 2003.
 18 Did any waitress ever complain to you when you
 19 were working the service bar about how long it took
 20 to receive a round of drinks once the order had been
 21 placed in the computer?
 22 A. Yes.
 23 Q. Was that something you heard more than once a night
 24 while you worked as the service bartender?

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1 A. Yes.
 2 Q. Would you call it a frequent complaint of the
 3 waitresses?
 4 A. Yes.
 5 Q. Did Leigh ever complain to you about that?
 6 A. Yes. Everyone has. It's restaurant life. Service
 7 bars, you put in your drinks and they have to wait to
 8 get them because it's not an instant thing.
 9 Q. Do you remember Leigh complaining to you about how
 10 long she had to wait for drinks on September 26,
 11 2003?
 12 A. No.
 13 Q. Did waitresses ever complain to you when you were
 14 working the service bar that customers complained to
 15 them about how long it took for drink orders to be
 16 placed?
 17 A. No, not that I recall.
 18 Q. From the time that you first started working at the
 19 Longhorn until you left, do you know of any efforts
 20 Longhorn management undertook to try to alleviate
 21 this problem?
 22 A. No.
 23 Q. Did anyone request of Longhorn management, that you
 24 know of, to try to alleviate the problem?

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1 A. No.
 2 Q. Now, can we turn to the page that has the Longhorn
 3 number page 9 on the upper right-hand corner of
 4 Exhibit 11? Do you see that?
 5 A. Yes.
 6 Q. Eighty-five percent of the way down on the bottom at
 7 9:17 p.m., there is a reference to "print check." Do
 8 you see that?
 9 A. Yes.
 10 Q. Can you tell from looking at this exhibit why at
 11 9:17 p.m. Leigh printed the check for Table 52?
 12 A. No. That would be a question for Leigh.
 13 Q. In your experience, what sorts of circumstances led
 14 you, as a waitress, to print checks while you worked
 15 at the Longhorn?
 16 A. Someone was leaving, either the whole group or one
 17 person from the group, or if I wanted to make sure I
 18 rang in something.
 19 Q. Anything else that you can think of?
 20 A. I can't think of any other reason for printing a
 21 check.
 22 Q. Can you turn to the next page? At 9:34 p.m., Leigh
 23 printed the check for Table 52; is that right?
 24 A. Yes.

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1 Q. Then she printed it again at 9:34. Do you see that?

2 A. Yes.

3 Q. I know this is a question better asked of Leigh, but

4 first of all, do you know why she printed Table 52's

5 check twice at 9:34 that evening?

6 A. No.

7 Q. Can you tell me, in your experience as a waitress at

8 the Longhorn, those circumstances which would have

9 led you to print a table's check more than once prior

10 to the time the check was closed out?

11 A. If people either wanted to split the check, you can

12 take certain things if they were paying separately.

13 That would be my only thing, but I imagine it

14 would say "split check." So I cannot really say any

15 reason why.

16 Q. When you are talking about a split check, the

17 computer has the ability to divide the amount owed

18 for the check among however many patrons it is

19 requested that it be divided among?

20 A. No. You can specifically split it by if someone

21 said, "I had ribs and a Coke," you can split off the

22 ribs and the Coke and give them a check.

23 Q. You have that capability?

24 A. Yes.

1 Q. Can we turn to the next page? It appears that at

2 9:57 Leigh applied payment. Do you see that?

3 A. Yes.

4 Q. What does that mean "applied payment"?

5 A. As I said before, just paying the check.

6 Q. Do you know why she applied payment in four entries

7 at 9:57?

8 A. I don't know why.

9 Q. And can you tell me, looking at any part of

10 Exhibit 11 other than the first page, how much the

11 check finally was, what the check total was for Table

12 52 that evening? Don't look at the first page.

13 A. I don't see it anywhere else.

14 Q. I do -- "closed check, \$202.79."

15 A. Yes.

16 Q. As of September 26, 2003, did Longhorn have any

17 procedure in place to prevent a patron at the

18 restaurant seated at a table from purchasing a drink

19 at the bar and then bringing it to the table?

20 A. No because it was not something that happened. If

21 someone bought a drink before they went to the table,

22 then they would take it with them.

23 Other than that, people would order from their

24 server.

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1 Q. But if that were done, in your experience, there

2 would be some indication that it was a split check;

3 is that right?

4 A. Yes.

5 Q. You don't see any such indication here; is that

6 right?

7 A. Right.

8 Q. At 9:36 it appears that Leigh printed the check

9 again, now a fourth time; is that right?

10 A. Yes.

11 Q. You don't know why; is that right?

12 A. No.

13 Q. Can you tell me how the amount of the tip when it's

14 not a credit card tip is actually entered into the

15 computer?

16 A. It's not if it's cash.

17 Q. When it's cash, it's not entered into the computer;

18 is that right?

19 A. Right.

20 Q. So at 9:46 it appears that the check for Table 52 is

21 printed a fifth time; is that right?

22 A. Yes.

23 Q. You don't know why?

24 A. No.

1 Q. My question to you is, did Longhorn have any

2 procedure in place, as of September 26, 2003, to

3 prevent a customer seated at a table from getting up,

4 going to the bar, buying a drink and bringing it back

5 to the table?

6 MR. GILLIS: Objection. Are you talking about a

7 written procedure or a custom and practice?

8 MR. FARRAH: Any procedure.

9 A. No.

10 Q. Did the Longhorn have any way to monitor whether or

11 not customers who were seated at a table waiting for

12 their drink orders got up, walked to the bar and

13 bought drinks?

14 A. The waitress would know if they had a drink that she

15 didn't bring them.

16 Q. Was there any directive, that you can recall, that

17 was ever given to the waitresses regarding what to do

18 if the waitress came upon a customer who had a drink

19 that she had not given them?

20 A. She would not give them the drink. If she was

21 bringing a drink to them, she would not bring another

22 drink, and if it ever did happen, she would say

23 something to the customer, "I can get you your

24 drinks."

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1 Q. Do you know that to be a practice and procedure that
2 the Longhorn employed?
3 A. I don't recall that ever happening.
4 Q. You don't recall ever being told by the Longhorn what
5 to do in the event as a server waitress that you came
6 upon a customer who had brought a drink from the bar
7 to the table?
8 MR. GILLIS: Objection.
9 A. No.
10 Q. After you got the call from the D.A., after the visit
11 from the state police, to testify the next day, did
12 you contact anybody at the Longhorn?
13 A. No.
14 Q. Did you contact anybody after you got the call from
15 the visit from the state police?
16 A. I called my family's lawyer just to know what to
17 expect because I had never gone to a courthouse.
18 Q. Who was that?
19 A. Bob Kelly.
20 Q. Where is he?
21 A. Quincy.
22 Q. I don't want to know what you said, but did you talk
23 to him at all about that group of guys and what you
24 had learned they had done prior to the time you

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1 received the visit from the state police?
2 MR. GILLIS: Objection.
3 A. No.
4 Q. And since the conversation you had with Bob Kelly
5 that came out of the visit by the state police, have
6 you talked to Kelly again about anything related to
7 this case?
8 A. No.
9 Q. Now, did you tell the district attorney that you
10 supplied drinks for anyone that was underage that
11 evening?
12 A. No.
13 Q. Did you supply drinks for anyone underage at Table 52
14 that evening?
15 A. No.
16 Q. Do you have any information that anyone drinking
17 alcoholic beverages at Table 52 that evening was
18 underage?
19 A. No.
20 Q. Did anyone ever tell you how much alcoholic beverages
21 Jeffrey Southworth had to drink at the bar before he
22 sat down at the table?
23 MR. GILLIS: Objection.
24 A. No.

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1 Q. Did you have any conversation with Leigh Chabot
2 concerning, if you know, the order that was placed at
3 8:40 for four Jack Daniels Manhattans and some
4 appetizers?
5 A. No.
6 Q. Is it your best memory that the conversation you had
7 with Leigh Chabot about the customers was not in
8 connection with the 8:51 order for seven Jack Daniels
9 Manhattans?
10 A. That's my best memory.
11 Q. Your best memory is it was in connection with the
12 9:21 order for four Jack Daniels Manhattans?
13 MR. GILLIS: Objection.
14 A. Yes.
15 Q. Three Jack Daniels Manhattans; is that right?
16 A. Yes.
17 Q. At Longhorn were you taught any of the laws governing
18 the service of alcohol in Massachusetts?
19 A. Yes.
20 Q. This was as of September 26, 2003. Tell me what you
21 recall you were taught.
22 A. That someone has to be twenty-one years of age with a
23 valid picture ID, being a license or passport. I
24 don't think Longhorn even took military IDs. One

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1 drink per customer. It's illegal to serve somebody
2 who is already intoxicated. It's illegal to serve a
3 known alcoholic, but I don't know how you can judge
4 that.
5 Q. Anything else that you can recall?
6 A. One drink per person at any one time. You cannot
7 bring over two drinks for any one person.
8 Q. Did the Longhorn have a customer practice, as of
9 September 26, 2003, about whether or not at the time
10 of being delivered a drink a customer could order
11 another drink?
12 A. Let me see if I'm clear. If someone had a drink, if
13 they could order another drink?
14 Q. No. I want to know, did the Longhorn have a custom
15 or practice in place, as of September 26, 2003, that
16 prohibited a customer, upon delivery to that customer
17 of a drink, from ordering from the waitress another
18 drink at that time?
19 MR. GILLIS: Objection.
20 A. No.
21 Q. Did the Longhorn have a custom or a practice in
22 place, as of September 26, 2003, that prohibited a
23 server from bringing a drink to a customer who had
24 not finished the drink that that customer was

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1 drinking?
2 A. Yes.
3 Q. What was that practice?
4 A. Not to bring a drink until the other drink was gone;
5 take a glass when you leave a glass.
6 Q. And where is that practice memorialized?
7 A. I don't know.
8 Q. Is it in any of the documents you received from the
9 Longhorn at any time you were employed there?
10 A. I can't say.
11 Q. Is that something you were trained in by Rebecca?
12 A. Yes.
13 Q. So a customer could not have more than one drink on
14 the table at any time; is that right?
15 A. Alcoholic drinks, yes.
16 Q. That's what we're talking about; is that right?
17 A. Yes.
18 Q. Is it your testimony that Longhorn employees were
19 instructed to remove the drink that the customer was
20 drinking and supply the customer with a new drink?
21 A. Yes.
22 Q. Take the unfinished drink away from the customer?
23 MR. GILLIS: Objection.
24 A. No.

1 A. I would take the order.
2 Q. And if by the time you had filled the order -- let's
3 say you were a bartender; you just had to turn around
4 to fill the order -- by the time you had filled the
5 order, if the customer had not finished that drink,
6 would you not deliver the order to the customer?
7 MR. GILLIS: Objection.
8 A. I would not make it right away. I would go get
9 something else first -- go check on someone's food.
10 There's many ways around that to allow the
11 customer time to finish the drink.
12 Q. You never had a customer that you were serving who
13 had more than one drink in front of them at any time;
14 is that right?
15 A. Correct.
16 Q. Now, as of September 26, 2003, you had been made
17 aware of the requirement in the Longhorn documents
18 that each bartender at the beginning of each shift
19 undergo an Exact-O-Pour test; is that right?
20 A. Yes.
21 Q. But you didn't undergo an Exact-O-Pour test at the
22 beginning of each shift; isn't that right?
23 A. Correct.
24 Q. You knew that Longhorn management was violating

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1 Q. Was it Longhorn's custom and practice at that time,
2 September 26, 2003, to require its servers to take an
3 unfinished drink away from the customer and replace
4 it with a new drink?
5 MR. GILLIS: Objection.
6 A. No.
7 Q. So it was Longhorn's custom and practice at that time
8 to not deliver a new drink to a customer who had not
9 finished his previous drink?
10 MR. GILLIS: Objection.
11 A. Yes.
12 Q. Can you think of any situation, prior to September
13 26, 2003, when any customer you saw at the Longhorn
14 Steakhouse had more than one drink in front of that
15 customer?
16 MR. GILLIS: Objection.
17 A. I can't. I can only speak for myself, what I did.
18 Q. What did you do?
19 A. I never served anyone that had a drink that they had
20 not finished in front of them. I can't speak for
21 other waitresses.
22 Q. Would you not take an order from the customer, prior
23 to September 26, 2003, who had not finished his
24 drink?

1 company policies in not requiring you to do that;
2 isn't that right?
3 MR. GILLIS: Objection; if you know what the
4 company's policies were.
5 I think you need a question before that to
6 determine if she's able to answer that. She's not
7 Longhorn management.
8 Q. You believed or as far as you knew, the company
9 policies regarding the operation of the bar, let's
10 say, were reflected in the various documents that had
11 been supplied to you and have been marked as exhibits
12 in this case; isn't that right?
13 A. Yes.
14 Q. You knew that, for example, Longhorn wrote in effect
15 in its Bar Operations Manual that every bartender
16 must undergo an Exact-O-Pour test at the beginning of
17 each shift; isn't that right?
18 MR. GILLIS: Objection.
19 A. Yes.
20 Q. And you knew that you were not undergoing
21 Exact-O-Pour tests at the beginning of each shift;
22 isn't that right?
23 A. Correct.
24 Q. Did you ever ask anybody why not?

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1 A.No. We did it a couple of times a week usually; so
2 no. It was up to the managers. It was not my job to
3 make sure every bartender was pouring.

4 Q.So this is a question that is better asked of
5 Mr. Noonan; is that right?

6 A. Yes.

7 Q.But you knew, nevertheless whether Mr. Noonan can
8 answer the question or not, as far as you knew,
9 Longhorn was violating its own procedures by not
10 requiring you to take the Exact-O-Pour test, isn't
11 that right, as far as you knew?

12 A. As far as I know, yes.

13 Q. And you knew that the Longhorn believed that
14 customers like to see a drink free poured; isn't that
15 right?

16 MR. GILLIS: Objection.

17 A. I'm not sure about that.

18 Q. Did you ever fail an Exact-O-Pour test?

19 A. No, not that I recall.

20 Q. Tell me about up-selling at the Longhorn. What does
21 that mean to you, up-selling?

22 A. If someone orders a Margarita, then rather than just
23 serve what we call the house Tequila, we say, "Do you
24 want Cuervo in that?" or "How about the Grand Gold

1 appetizers and desserts and things.

2 Q. What are shooters at the Longhorn?

3 A. It's a shot.

4 Q. Are you familiar with the Bar Recipe Manual and the
5 various drinks called shooters in the Bar Recipe
6 Manual?

7 A. Yes.

8 Q. So not what are shots, but what are shooters? That's
9 my question.

10 A. I believe they have more than one alcohol in them --
11 layered shots, like B52 or things like that.

12 Q. While you were at the Longhorn, did you ever make any
13 shooters for customers?

14 A. No, not that I recall.

15 Q. Did you ever see anyone make any shooters for
16 customers at the Longhorn?

17 A. I don't recall.

18 Q. Were shooters described in Longhorn's menu while you
19 worked there?

20 A. No.

21 Q. Did the Longhorn have a bar menu while you worked
22 there, that is a list of drinks available to people
23 at the bar?

24 A. They had the liquors listed and the beers listed,

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1 Margarita?"

2 It's just trying to get them to spend more
3 money, basically.

4 Q. Trying to get customers to order more expensive
5 drinks, basically?

6 A. Correct.

7 Q. Did you up-sell at the Longhorn?

8 A. Yes.

9 Q. How was your performance rated, if you know, while
10 you were at the Longhorn?

11 A. I would say very well.

12 Q. No, no, I don't mean how were you regarded, although
13 I'm sure you were regarded highly by everybody, but
14 if you know, what sort of ratings of your performance
15 did Longhorn have, keep, make, undertake?

16 A. I don't know. We met with managers every so often,
17 and they would go over your performance.

18 Q. What sorts of things would the managers talk to you
19 about when they went over your performance?

20 A. Being punctual, appearance, uniform, being friendly
21 to customers.

22 Q. Up-selling drinks?

23 A. No; just menu knowledge in general, trying to get
24 your checks in general to be higher, offering

1 wines and Margaritas, but nothing with shooters on
2 it.

3 Q. Let me ask you something. Tell me how, if you know,
4 a Longhorn patron would be aware of the fact that the
5 Longhorn offered shooters.

6 A. They asked.

7 Q. Do you understand shooters to be an expression that
8 is not particular to the Longhorn Steakhouse
9 restaurants?

10 A. Correct.

11 Q. Let me ask you the next question. If I'm a patron,
12 as of September 26, 2003, who wants a shooter, how do
13 you know what it's going to cost me to have the
14 shooter, to buy the shooter from you?

15 A. I would have to say, "Give me a second and I'll ring
16 it in and let you know."

17 Q. So as far as you know, there was no document
18 delivered to patrons as of September 26, 2003 that
19 informed the patron of what the shooter would cost?

20 A. No. There are never liquor prices. It's not
21 restaurant practice.

22 Q. It's not family restaurant practice; is that what
23 you're saying?

24 A. I don't know anywhere that puts prices next to

1 drinks, but definitely not in a restaurant like a
2 Longhorn-type of place.
3 Most people are not coming in there to do shots
4 or have shooters.
5 Q. Can you tell me why several pages of the Longhorn Bar
6 Operations Manual are devoted to different shooters
7 by name?
8 A. I can't answer that. I did not write it.
9 Q. And if I came in and ordered a shooter but wanted to
10 know beforehand from you what it was going to cost as
11 of September 26, 2003, where would you go to get that
12 information?
13 A. To my computer.
14 Q. And your computer would tell you what it would be?
15 A. Once I rang it in, yes.
16 Q. But you never poured any shooter for any customer at
17 any time while you worked as a bartender at the
18 Longhorn; is that right?
19 A. As far as I recall, I did not.
20 Q. And you don't know of any advertising materials that
21 were available at any time that you worked at the
22 Longhorn encouraging customers to purchase shooters;
23 is that right?
24 MR. GILLIS: Objection.

1 Q. You expected to do that, didn't you?
2 A. Yes.
3 Q. That's Exhibit 2 to your deposition; is that right?
4 A. Yes.
5 Q. On page Bates stamped 693 about halfway down, it's
6 "Delivering Appetizers."
7 A. Yes.
8 Q. The manual reads, "Sell a second round of drinks.
9 Always suggest another round when the first guest's
10 drink is half full."
11 A. Yes.
12 Q. Is that right? Have I read that correctly?
13 A. Yes.
14 Q. But you never did that; is that right?
15 A. No, because I had drink access right there, as you
16 stated earlier. I was at the bar. So it would take
17 me less time.
18 Q. This is the Bar Operations Manual. Are you telling
19 me that you never followed Longhorn procedure that
20 you always suggest another round when the first
21 guest's drink is half full?
22 MR. GILLIS: Objection.
23 A. I didn't always do that, no.
24 Q. Did you ever do it?

1 A. Correct.
2 Q. And you can't tell me, as you sit here today, the
3 price of any shooter; is that right?
4 A. Correct.
5 Q. Can you tell me the price of a twenty-five ounce beer
6 as of September 26, 2003?
7 A. I think it was like \$4.10 with tax.
8 Q. It's your best memory that the names of the various
9 shooters described in the Longhorn Bar Operations
10 Manual are industry-wide names; is that right?
11 A. Yes.
12 Q. Do you remember ever having any conversations with
13 anyone at Longhorn management about trying to up-sell
14 shooters?
15 A. No.
16 Q. Did you ever, while you worked at the Longhorn,
17 suggest to a customer when that customer's first
18 drink was half full that the customer purchase
19 another round of drinks?
20 A. I would not say "half full"; at half full, no.
21 Q. Were you instructed, while you were at the Longhorn,
22 to follow the provisions of the Bar Operations
23 Manual?
24 A. Yes.

1 A. I may have if it was very busy and I thought it would
2 be a while before I would get back with the drinks,
3 then yes, I would have.
4 Q. Stick on this page for a minute, okay? This page, by
5 the way, sets out the order in which Longhorn would
6 like its bartenders to interact with customers; is
7 that right?
8 MR. GILLIS: Objection.
9 A. Yes.
10 Q. It instructs you to ring the drink up first and then
11 make the drink order; is that right?
12 A. Yes.
13 Q. You're to deliver that drink with a smile within two
14 minutes; is that right?
15 A. Yes.
16 Q. And that's within two minutes of ordering; is that
17 right?
18 A. That's what it says.
19 Q. And then while you're delivering that drink, the
20 manual tells you it's a perfect time to sell an
21 appetizer; is that right?
22 A. Yes.
23 Q. And you're then instructed to -- this is now about
24 forty percent of the way down under "Delivering

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1 Appetizers," "with a smile after the order of the
2 appetizer to deliver it within three to five
3 minutes"; is that right?
4 A. Yes.
5 Q. And you're instructed that this is the time to
6 suggest another drink; isn't that right?
7 A. Yes.
8 Q. How much time has elapsed from when the customer
9 first sat down and placed the drink order to when the
10 appetizer has been delivered?
11 MR. GILLIS: You're asking her what she did or
12 what it says?
13 Q. What does this say?
14 A. In a perfect world in an empty restaurant where
15 everything comes on time, according to this it would
16 be seven minutes, but that never happens.
17 Q. But that's what the Longhorn strived for; is that
18 right?
19 A. Yes.
20 Q. So within seven minutes -- and it's actually five to
21 seven minutes, isn't it, of when the customer has sat
22 down and ordered the first drink, the Longhorn
23 bartender is instructed in this manual to suggest to
24 the customer that she or he order another drink; is

1 sure that people drinking were consuming food with
2 it.
3 So where I would have indirect service through
4 the service bar, I would inquire and communicate with
5 waitresses and managers often.
6 Q. Often?
7 A. Yes. It's pretty much what you do when you're a
8 bartender.
9 Q. Is ask managers to check and see if customers should
10 have more drinks?
11 A. No; to make sure that people were eating, in general.
12 Q. This is something you were taught; is that right?
13 A. Yes; proper alcohol service.
14 Q. You were not taught that at J.R.'s?
15 A. There wasn't food at J.R.'s.
16 Q. You were not taught anything about alcohol service at
17 J.R.'s; isn't that right?
18 A. No; just basic laws. It was owned by police
19 officers.
20 Q. You were not trained at J.R.'s.
21 A. No.
22 Q. And you were not TIPS trained as of September 26,
23 2003; isn't that right?
24 MR. GILLIS: Objection.

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1 that right?
2 A. According to this, yes.
3 Q. Am I correct that you did not stir the Jack Daniels
4 Manhattans that you made on the evening of
5 September 26, 2003?
6 MR. GILLIS: Objection.
7 Q. Let's strike that. Did you stir the Jack Daniels
8 Manhattans that you made on the evening of
9 September 26, 2003?
10 A. No.
11 Q. Up to September 26, 2003, had you ever refused a
12 patron of the Longhorn Steakhouse a drink?
13 A. There was never a need to.
14 Q. So the answer is no, you never did?
15 A. Correct.
16 Q. Up to September 26, 2003, had you ever sought input
17 from management about whether or not a patron should
18 be served a drink?
19 A. Yes.
20 Q. When did you do that?
21 A. At any time that I felt that I needed to ask if they
22 were eating, just that it was my practice as a
23 bartender.
24 That was what I had always been taught, to make

1 A. Yes.
2 Q. Is that true?
3 A. Yes.
4 Q. That's true, correct?
5 A. Yes.
6 Q. You were not TIPS trained; is that right?
7 A. Correct.
8 Q. You were not Bar Code trained as of September 26,
9 2003; isn't that right?
10 A. Yes.
11 Q. At some point in time despite that you were not TIPS
12 trained or Bar Code trained, you requested of
13 Longhorn that you become a trainer in proper alcohol
14 service procedures for Longhorn employees; is that
15 right?
16 A. They approached me, yes.
17 Q. But you were not TIPS trained at that time; isn't
18 that right?
19 A. Correct.
20 Q. And you were not Bar Code trained at that time; is
21 that right?
22 A. Correct.
23 Q. But someone at the Longhorn approached you about
24 yourself training other Longhorn trainees; is that

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1 right?
2 A. Yes.
3 Q. Who approached you?
4 A. The manager, Leigh.
5 Q. Leigh who?
6 A. I don't know her last name. I believe it's Bull,
7 B-u-l-l.
8 Q. Is she still at the Longhorn?
9 A. Not that Longhorn.
10 Q. She's at a different Longhorn?
11 A. Yes.
12 Q. Where?
13 A. I don't know.
14 Q. How do you know she's at a different one?
15 A. Someone told me she went to a different Longhorn.
16 Q. You don't know when?
17 A. No.
18 Q. What did she say to you when she asked you to become
19 a trainer?
20 A. She said, "Would you be interested in becoming a
21 trainer?"
22 Q. Anything else?
23 A. Not that I recall at that time.
24 Q. Okay, and up to that point, you had only worked at

1 shifts how many shifts you worked at Whiskeys as a
2 bartender.
3 A. Not many.
4 Q. One?
5 A. I would say three or four, tops.
6 Q. Did you ever work at Whiskeys as a service bartender?
7 A. No.
8 Q. There was no need to have a service bartender at
9 J.R.'s; isn't that correct?
10 A. Correct.
11 Q. So the first service bartender experience you had in
12 your life was at the Longhorn; is that right?
13 A. Yes.
14 Q. Okay. As of September 26, 2003, how many nights had
15 you worked as a service bartender?
16 MR. GILLIS: Objection. I don't think it's been
17 establishment that anyone worked just at the service
18 bar.
19 She's already testified to that at length in the
20 first part of the deposition as to how they broke
21 that up.
22 Q. How many nights had you performed any service
23 bartending functions at the Longhorn, as of September
24 26, 2003?

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1 Whiskeys, J.R.'s and Longhorn; is that right?
2 A. Yes.
3 Q. And as of September 26, 2003, you had been working at
4 the Longhorn for a matter of a few months, more or
5 less; is that accurate?
6 A. Yes.
7 Q. Is that right?
8 A. Yes.
9 Q. You started in June or July of 2003; is that right?
10 A. Yes.
11 Q. Which was it?
12 A. I'm not sure exactly; the end of June or early July.
13 Q. And you had worked about a year before that at
14 J.R.'s; is that right?
15 A. Yes.
16 Q. And you had worked at Whiskeys before J.R.'s for a
17 period of months; isn't that right?
18 A. Yes.
19 Q. Like three or four months?
20 A. Yes.
21 Q. Most of the time you worked at Whiskeys had been as a
22 waitress as opposed to a bartender; is that right?
23 A. As a cocktail waitress.
24 Q. In fact, quantify for me, if you can, in terms of

1 A. Every shift I worked, which was four nights a week.
2 Q. Which four nights of the week?
3 A. Tuesday, Wednesday, Friday and Saturday nights.
4 Q. You dropped Tuesdays very early on; isn't that right?
5 A. I did.
6 Q. How many Tuesdays did you work at the Longhorn?
7 A. I can't say.
8 Q. One?
9 A. More than one.
10 Q. How long was it after September 26, 2003, if you can
11 tell me, that Leigh Bull came to you and asked you to
12 become a trainer?
13 A. I don't recall.
14 Q. Weeks?
15 A. I have no idea.
16 Q. Was it before you were supposed to take the TIPS
17 test?
18 A. I'm not sure.
19 Q. You said, "Yes, I want to become a trainer;" isn't
20 that right?
21 A. Yes.
22 Q. And you undertook to train some Longhorn employees
23 after that; is that right?
24 A. After I went through training to become a trainer.

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1 Q. After you yourself went through training to become a
2 trainer; is that right?

3 A. Yes.

4 Q. So my question again to you -- I'm sorry if it seems
5 like I'm asking the same question over and over
6 again.

7 While you were at the Longhorn, did you ever --
8 this is up to September 26, 2003 -- did you ever ask
9 anyone for a second opinion about whether or not a
10 particular customer should be served a drink?

11 MR. GILLIS: Are you talking about people she
12 served directly?

13 A. People at the bar?

14 Q. Yes.

15 A. No.

16 Q. Because you felt you knew, based on your experience,
17 whether or not that person should have a drink; is
18 that right?

19 A. Yes.

20 Q. At any time up to September 26, 2003 while you were
21 working as a server, as a waitress, did you ever ask
22 a second opinion of anyone at the Longhorn about
23 whether or not one of your customers should be served
24 a drink?

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1 MR. GILLIS: Objection.

2 A. No.

3 Q. At any time up to September 26, 2003 while you were
4 working as a service bartender, did you ever ask of
5 anyone at the Longhorn for a second opinion about
6 whether or not a waitress's customer should have
7 another drink?

8 A. Yes.

9 Q. Under what circumstances did you ask for that second
10 opinion?

11 A. When I asked Chuck, that we have been talking about
12 all day.

13 Q. That was the first time you ever asked anyone at the
14 Longhorn for a second opinion about whether a
15 customer should have another drink?

16 MR. GILLIS: Objection.

17 A. A second opinion other than my own or the waitress?
18 I don't know where you're going with this.

19 Q. I'll be happy to ask the questions again. I'm happy
20 to go over the questions I have just asked you again,
21 but I'd rather not for all of our sakes.

22 So what I want to know is, other than the night
23 of September 26, 2003 when you spoke to Chuck, either
24 asking him to go check and then having another

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1 conversation with him after he checked or just asking
2 him if he had checked, did you ever while you were
3 serving as a service bartender, did you ever ask of
4 anyone at the Longhorn for a second opinion about
5 whether any customer at the Longhorn should be served
6 another drink?

7 MR. GILLIS: Objection.

8 A. I don't recall specifically.

9 Q. So is it your best memory, as you sit here today,
10 that the first time you had occasion to ask anyone at
11 the Longhorn for a second opinion about whether or
12 not a customer should be served another drink is the
13 night of September 26, 2003?

14 MR. GILLIS: Objection. That was not the
15 question you asked.

16 You keep changing the questions to make them
17 sound the same, and it's not fair to her.

18 If you want to ask the same question, she told
19 you already that she doesn't recall a specific
20 occurrence, but she never said that that was the
21 first time she ever asked anybody.

22 So ask the right question instead of putting two
23 little bits, two different ones to try to trick on
24 the question.

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1 MR. FARRAH: I'm not trying to trick her.

2 MR. GILLIS: Well, it sure seems that way from
3 the way you're asking the questions.

4 Q. Let me ask you this. Other than September 26, 2003
5 when you spoke to Chuck, up to that point, had you
6 ever asked anybody at the Longhorn for a second
7 opinion about whether any customer should be served
8 another drink?

9 A. I can't recall specifically.

10 Q. So is it your best memory that the first time you
11 asked anyone at the Longhorn for a second opinion
12 about whether or not a customer should be served
13 another drink was the night of September 26, 2003?

14 MR. GILLIS: Objection. That's the same thing.

15 A. I don't know. I already said I can't remember if
16 that was the first time.

17 Q. But you can't think of any other times?

18 MR. GILLIS: That's a different question.

19 A. But that doesn't mean it's the first time.

20 MR. GILLIS: If you want to ask her if she has a
21 memory of asking a supervisor prior to that date, she
22 could answer that question, but to say it was the
23 first time that she ever asked a manager is a
24 deceptive question.

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1 Q. You have no memory of prior to September 26, 2003
2 asking anyone at the Longhorn for a second opinion
3 about whether or not a customer should have another
4 drink; isn't that right?

5 A. Correct.

6 Q. All right, that's fine. That's all I want to know.

7 Had you been trained, up to that point at the
8 Longhorn, about in what circumstances it was
9 appropriate to ask for a second opinion about whether
10 or not a customer should have another drink?

11 A. It was on your own judgment.

12 Q. No training other than that?

13 A. All the training -- using that training and applying
14 your judgment. Most of it is common sense.

15 Q. Were you taught to deliver drinks to customers as
16 quickly as you could when you were acting as a
17 waitress?

18 MR. GILLIS: Objection.

19 A. There were time lines set in the training manuals,
20 but it was very difficult to stick with them. So we
21 would do the best we could.

22 Q. Was it a Longhorn policy as of September 26, 2003 for
23 servers to check with previous servers -- Leigh to
24 check with the bartender -- to determine how much a

1 Q. Was there any instruction that you ever saw from
2 Longhorn to its waitresses, prior to September 26,
3 2003, under any circumstances to check with the
4 bartender to see what a customer had had to drink?

5 A. No.

6 Q. Can we agree that the principal purpose of the bar at
7 the Longhorn Steakhouse was to serve as a place where
8 customers are waiting tables to have a drink before
9 going to the table? This is a family restaurant,
10 isn't it?

11 A. Right. People ate at the bar, though.

12 Q. But people also had a drink or two at the bar before
13 they went to the table; isn't that right?

14 A. Some people may have had a drink at the bar, yes.

15 Q. When you were acting as a bartender working the bar
16 as opposed to a bartender acting as the service
17 bartender, you served more than one drink to
18 customers you knew ultimately went and had dinner at
19 the Longhorn restaurant; isn't that right?

20 MR. GILLIS: Objection. Under what
21 circumstances?

22 MR. FARRAH: Ever, ever.

23 MR. GILLIS: That's different than saying she
24 served two drinks to anyone.

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1 patron had had to drink up to that point?

2 MR. GILLIS: Under what circumstances?

3 MR. FARRAH: Under any circumstances.

4 A. For a waitress to ask the bartender?

5 Q. Yes.

6 A. About her own tables?

7 Q. About what persons coming to her own table had to
8 drink while they were at the bar.

9 A. If she felt a need to.

10 Q. It sounds like a good commonsense answer, but what I
11 want to know is, did Longhorn have a practice, a
12 procedure, a custom in place as of September 26, 2003
13 instructing waitresses to check with the bartender to
14 determine how much a particular customer coming to
15 sit at a table had had to drink at the bar before
16 coming to sit at the table?

17 MR. GILLIS: In every occasion?

18 MR. FARRAH: For any occasion.

19 MR. GILLIS: Under what circumstances?

20 MR. FARRAH: That's going to be part two of the
21 question.

22 A. You're asking if there was a set policy?

23 Q. Yes.

24 A. No.

1 MR. FARRAH: Would you read back the question?
2 (Court reporter reads back question.)
3 (Off the record.)

4 Q. Have there been occasions when you were working as
5 the bartender, not the service bartender, at the
6 Longhorn, when you served more than one drink at the
7 bar to a customer who then went to the restaurant to
8 eat?

9 A. Yes.

10 Q. Have there been occasions when you were working as a
11 bartender, as opposed to a service bartender, at the
12 Longhorn and you served as many as three drinks to a
13 customer who then went to the restaurant to eat?

14 A. I can't say for certain, no, one way or the other.

15 Q. At any time while you worked as a bartender at the
16 Longhorn prior to September 26, 2003, did you ever
17 communicate to a waitress the number of drinks that
18 you had served at the bar to any customer who then
19 went to the restaurant to eat?

20 A. If I felt that there was a need to I would.

21 Q. Do you have a memory of ever doing it?

22 A. I don't have a memory of any specific time, no.

23 Q. Okay. At any time prior to September 26, 2003, did
24 you ever take a drink away from a customer because

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1 the customer was, in your opinion, not suitable to be
2 drinking?

3 A. No.

4 Q. Did you ever arrange safe passage home from the
5 Longhorn for an intoxicated person?

6 A. No.

7 Q. Did you ever have to call the police to the Longhorn
8 for any intoxicated patron?

9 A. No.

10 Q. Were the police ever called by anyone to the
11 Longhorn, to your knowledge, to deal with an
12 intoxicated patron?

13 A. Not to my knowledge.

14 Q. When you were acting as a bartender, how did you keep
15 track of the number of drinks that you had served to
16 a customer?

17 A. If they didn't have a tab, if they paid as they went,
18 I would keep track of it myself.

19 Q. In your head?

20 A. Yes.

21 Q. Not on paper?

22 A. No.

23 Q. Not by computer?

24 A. If they had an open check, then yes, by computer.

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1 Q. Was there only one station to which waitresses could
2 go to get drinks from the service bartender for their
3 tables?

4 A. Yes.

5 Q. We've already talked about where that was located.

6 So my next question to you is, other than sitting on
7 the stools that were arrayed around the bar as of
8 September 26, 2003 at the Leominster Longhorn, were
9 customers permitted to stand and have drinks at the
10 bar?

11 A. Yes.

12 Q. And were there times on busy nights when customers
13 standing at the bar were two and three deep?

14 A. No.

15 Q. Quantify for me, mindful of the fact that there are
16 fourteen stools shown at least on this exhibit around
17 the bar -- and exclude for me, if you will, at least
18 for the time-being, Tables 1, 2 and 3 -- and tell me
19 on a busy night how many people at the busiest point
20 would be sitting and standing in the bar area at the
21 Leominster Longhorn.

22 A. I would say no more than thirty.

23 Q. A little more than double the number of stools; is
24 that right?

1 MR. GILLIS: Are you talking about standing and
2 sitting?

3 MR. FARRAH: Yes, standing and sitting.

4 Q. If we add in a two-top, a four-top and a two-top --
5 eight more -- we're talking at its busiest somewhere
6 around thirty-eightish customers in the bar area?

7 A. People sitting at Tables 1, 2 and 3 would eat there
8 and finish everything there and leave. They would
9 not sit there and then go to a table.

10 Q. The service bartender was responsible for Tables 1, 2
11 and 3; is that right?

12 A. When there were three bartenders on, yes, there would
13 be someone doing those tables.

14 Q. That would be the service bartender; is that right?

15 MR. GILLIS: Objection.

16 A. No.

17 Q. So at its busiest point, two bartenders would be in
18 charge of those persons sitting and standing at the
19 bar and Tables 1, 2 and 3 as shown on Exhibit 8; is
20 that right?

21 MR. GILLIS: Objection.

22 A. No.

23 Q. Who would be responsible to the patrons sitting and
24 standing at the bar and Tables 1, 2 and 3 at the

1 busiest time?

2 MR. GILLIS: With two or three bartenders?

3 MR. FARRAH: With three bartenders.

4 A. With three bartenders, there would probably be one
5 person doing the bar, one person doing the tables,
6 one person doing the service, and the table person
7 would back up and help.

8 Q. The table person would help who?

9 A. The service bar or the main bar, whoever needed it --
10 if they needed food brought out or anything;
11 stocking, they could help.

12 Q. So at its busiest point, one bartender could be
13 serving as many as thirty customers -- those persons
14 sitting at and standing around the bar; is that
15 right?

16 MR. GILLIS: Objection. Solely or with backup?

17 MR. FARRAH: That's what I'm trying to figure
18 out.

19 MR. GILLIS: She already told you that they have
20 backup.

21 Q. Well, I understood that the nonservice bartender was
22 responsible for Tables 1, 2 and 3 and for backing up
23 the others; is that right?

24 A. Yes.

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Page 10

1 MR. GILLIS: With two or three bartenders?
 2 MR. FARRAH: Three bartenders -- all that was
 3 going on, on September 26, 2003.
 4 Q. And the bartender that backed up could do things like
 5 take drink orders for patrons around the bar; is that
 6 right?
 7 A. Yes.
 8 Q. Could that bartender who backed up also be making
 9 drinks for the service bar at the same time that
 10 someone else was making drinks for the service bar,
 11 or would it get too crowded?
 12 A. They could help with some things, but it is a small
 13 area.
 14 Q. Did you ever serve shots while you were a bartender
 15 at the Longhorn?
 16 A. Not that I recall.
 17 Q. Do you know what I mean by a "shot"?
 18 A. Yes.
 19 Q. Not a shooter.
 20 A. Yes, I know.
 21 Q. Did the Longhorn have a limit on how many drinks it
 22 would serve a patron on any one evening, that you
 23 knew of?
 24 A. No.

1 Q. That was when you acted as a waitress or a bartender?
 2 A. No. \$2.63 is currently minimum wage for waitresses.
 3 I can't speak for 2003.
 4 Q. \$2.63?
 5 A. Yes.
 6 Q. And you waited from time to time; is that right?
 7 A. Yes.
 8 Q. Why was that?
 9 A. Extra money.
 10 Q. When you waitressed, were you paid \$2.63 an hour?
 11 A. Yes.
 12 Q. Typically, how much can a good waitress earn in tips
 13 for a night?
 14 A. On a weeknight or weekend?
 15 Q. Busy night.
 16 A. Minimum, \$100.
 17 Q. What was the shift that a waitress worked at night?
 18 A. They were staggered. The first one came in at 4:00;
 19 the last one came in at 6:00.
 20 Q. The ones that came in at 6:00 left when?
 21 A. They closed.
 22 Q. 11:00 on weekends?
 23 A. Yes.
 24 Q. Can you tell me, as you've used the expression in

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Page 10

1 Q. Did the Longhorn serve beer by the pitcher?
 2 A. No.
 3 Q. Am I correct that employees are not allowed to
 4 consume alcohol while working?
 5 A. Correct.
 6 Q. Do you know whether the Longhorn had a manager
 7 incident log or some similar document while you
 8 worked there?
 9 A. I don't know.
 10 Q. Was there ever a time that you wanted to stop serving
 11 alcohol to a customer and a manager at the Longhorn
 12 overruled you?
 13 A. No.
 14 Q. Did you need management approval to stop serving
 15 alcohol to a customer?
 16 A. No.
 17 Q. You never did it; is that right?
 18 A. Right.
 19 Q. How were you paid at the Longhorn? Did you get a
 20 salary and tips?
 21 A. Yes, hourly pay.
 22 Q. Do you remember what your hourly pay was as of
 23 September 26, 2003?
 24 A. Six dollars, five.

1 your earlier deposition -- Let's go to page 62 of
 2 your deposition.
 3 If you go to the beginning of 61, this is the
 4 conversation you had with Patty.
 5 You answered on page 62 on line 4, "I don't know
 6 where the information came from, and I just kind of
 7 brushed it off."
 8 Do you remember what information you were
 9 talking about?
 10 A. When she said that she heard there was an accident.
 11 Q. You can't think of anything else that she said, other
 12 than there was an accident with that group of guys;
 13 is that right?
 14 A. No.
 15 Q. You don't remember her saying, "That group of guys
 16 was drunk"?
 17 A. No, nothing like that. Before she said, "Remember
 18 the Manhattans you made," and then I said "Oh, yes,
 19 the people at Leigh's table."
 20 Q. How did she know that you made Manhattans for these
 21 people?
 22 MR. GILLIS: Objection.
 23 A. Because she was there that night with me working.
 24 MR. GILLIS: If you know. If you don't know,

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Page 11

1 don't guess.

2 A. I can't speak for Patty. You probably have to ask

3 Patty that.

4 Q. To your knowledge, did anyone from Longhorn go over

5 to that table at any point in time that night and say

6 to the people at that table, "You're loud. Quiet

7 down," or words to that effect?

8 A. Not that I know of.

9 Q. Then a little further on in your answer you say

10 there -- this is line 7 -- I asked you, "What did you

11 say?" Your answer is, "That seems odd."

12 What seemed odd to you?

13 A. That someone got in an accident because no one left

14 there visibly intoxicated to me.

15 Q. So had Patty said something to you about that these

16 people were drunk or words to that effect?

17 MR. GILLIS: Objection.

18 Q. When she described it to you.

19 A. She just said she heard there was an accident. That

20 was it.

21 Q. But it's not odd that someone who was a restaurant

22 patron got into an accident, is it? That's was not

23 what you were responding to was odd, was it?

24 A. No. I don't recall exactly.

1 anything of that nature, that's what I would mean by

2 "visibly intoxicated."

3 Q. Loud is an element of "visibly intoxicated;" is that

4 right?

5 MR. GILLIS: Objection.

6 A. Yes.

7 MR. GILLIS: Under what circumstances?

8 MR. FARRAH: Her definition. These are her

9 words -- "visibly intoxicated."

10 MR. GILLIS: She's saying that is one of the

11 elements. Nobody asked yet is that present in every

12 single person.

13 Are you asking what elements people show that

14 would lead you to that, or are you asking what does a

15 person have to show in every single circumstance?

16 MR. FARRAH: I'm asking her what she means and

17 what she meant by "visibly intoxicated."

18 MR. GILLIS: Under what circumstances?

19 MR. FARRAH: Under the circumstances of that

20 night.

21 Q. September 26, 2003, you told Patty and you have

22 testified that no one appeared visibly intoxicated to

23 you at that table; is that right?

24 A. In the restaurant; no one in the restaurant.

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1 Q. What Patty and you were talking about was that the

2 driver was alleged to have been intoxicated; isn't

3 that right?

4 MR. GILLIS: Objection.

5 A. Yes.

6 Q. What you said to her in effect was, "That's odd. I

7 don't recall anyone leaving here visibly

8 intoxicated," or words like that; isn't that right?

9 A. Correct.

10 Q. You were surprised that there was such a claim that

11 the driver was intoxicated; is that right?

12 A. Yes.

13 Q. Because you had not seen anybody visibly intoxicated;

14 is that right?

15 A. Correct.

16 Q. What do you mean by "visibly intoxicated"?

17 A. Someone appearing to be intoxicated, appearing drunk.

18 Q. Falling down?

19 MR. GILLIS: Objection.

20 Q. Is that one of the elements of "visibly intoxicated"

21 as you view it?

22 A. I would say someone falling down would be a red zone,

23 would be past that.

24 Someone appearing to be loud or staggering or

1 Q. What I want to know is, without making a big deal out

2 of it, tell me all the things that visibly

3 intoxicated means to you.

4 A. Difficulty walking, any swaying, if someone falls

5 asleep at their table or things like that, obvious

6 signs.

7 Q. Anything else?

8 A. In addition, people being loud, changes in speech

9 patterns, everything that I said previous.

10 Q. Anything else?

11 A. No.

12 MR. FARRAH: Just give me a second.

13 (Off the record.)

14 Q. Just describe for me, if you can, instances where on

15 a night where three of you were working as bartenders

16 on Friday or Saturday night, a person who was working

17 as a service bartender would stop doing that for some

18 period of time.

19 What would trigger that, other than having to go

20 to the bathroom?

21 A. If they were going to have a cigarette, if they were

22 going to make a phone call -- anything. If they were

23 helping run food to the people sitting at the bar

24 because they were right there in the kitchen.

1 Q. Correct me if I am wrong. On a busy Friday night,
2 like September 26, 2003, the need for the service
3 bartender to be making drinks for the waitresses was
4 virtually nonstop; isn't that right?
5 MR. GILLIS: Objection. There's been no
6 evidence whatsoever that that was the situation on
7 that specific evening.
8 She's testified that most Friday nights were
9 like that but not that specific night.
10 Q. Was Friday night, September 26, 2003, a typical, busy
11 Friday night in the fall of the year?
12 A. As far as I recall, yes.
13 Q. Straight-out or flat-out I think you testified to the
14 first day.
15 MR. GILLIS: Objection. Where is that
16 testimony?
17 A. I believe I said I don't recall it being that way.
18 MR. GILLIS: I don't think she ever testified on
19 this night that it was flat-out all night long.
20 Q. Was it flat-out, best as you can recall, between 7:00
21 and 10:00 on this Friday night, September 26, 2003?
22 MR. GILLIS: If you remember.
23 A. Typical Friday night, busy. I don't recall it being
24 abnormally busy. Fridays are generally busy.

1 Q. Did you smoke back then?
2 A. I did.
3 Q. You've stopped since then, or else you'd be dying to
4 have a cigarette.
5 A. It's been two years, but I'm dying.
6 MR. FARRAH: But not to have a cigarette. I
7 don't think I have any more questions. Give me one
8 second.
9 (Off the record.)
10 Q. I don't want to know what you said, but do you know
11 who Ben Wilson is?
12 A. The name doesn't trigger anything with me.
13 Q. A Rare employee named Ben Wilson, did you ever hear
14 of him?
15 A. No.
16 Q. Manager of Risk Administration at Rare, did you ever
17 hear of that title?
18 A. It doesn't trigger anything with me.
19 Q. Have you ever spoken to Ben Wilson?
20 A. I'm going to say yes since you're asking me.
21 MR. GILLIS: No. If you don't know, don't
22 guess.
23 A. No. I can't say.
24 MR. GILLIS: If you know the answer, give the

1 Q. What I want to know is during a normally busy Friday
2 night in the fall of 2003, was the need for a service
3 bartender to serve drinks, make drinks and get drinks
4 to the waitresses a constant need?
5 MR. GILLIS: Objection.
6 Q. Not the best question ever asked, but see if you can
7 answer.
8 A. I would not say it was constant. It was busy. It's
9 not a constant thing, not spewing tickets all night,
10 but you're busy.
11 Q. So is it accurate to say that of the three
12 bartenders, the service bartender is the busiest
13 bartender on a typically busy Friday night?
14 MR. GILLIS: Objection.
15 A. No.
16 Q. Or is everybody equally busy?
17 A. It all depends if you have people eating a lot at the
18 bar. It all depends.
19 Q. Do you have any memory of anybody spelling you? By
20 "spelling" I mean relieving you from your duties --
21 your service bartender duties -- the night of
22 September 26, 2003?
23 MR. GILLIS: Objection.
24 A. No, I don't recall.

1 answer.
2 A. I don't know.
3 Q. Is Patty's last name Kreidler? Does that ring a
4 bell?
5 A. Yes, something along those lines.
6 MR. GILLIS: Don't guess.
7 A. I don't know.
8 Q. I'm going to ask you some names. Tell me whether you
9 know any of these people.
10 Jeffrey Southworth, do you know him?
11 A. Know him personally?
12 Q. Yes.
13 A. No.
14 Q. How about Jude Connolly? Do you know him?
15 A. No.
16 Q. Scott Espy?
17 A. No.
18 Q. Thomas Scott Espy?
19 A. No.
20 Q. Michael Espy?
21 A. No.
22 Q. William Todd Curry?
23 A. No.
24 Q. Bruce Sirjane?

1 A. No.
 2 Q. Matt Cenicola?
 3 A. No.
 4 MR. FARRAH: Okay.
 5
 6 (Whereupon, the deposition was concluded at
 7 2:45 p.m.)
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1 CERTIFICATE
 2 COMMONWEALTH OF MASSACHUSETTS
 3 COUNTY OF MIDDLESEX, SS
 4
 5 I, BARBARA J. SIMON, a Professional Shorthand
 6 Court Reporter and Notary Public in and for the
 7 Commonwealth of Massachusetts, do hereby certify that
 8 the foregoing deposition of Kristin O'Donnell, was
 9 taken before me on Wednesday, December 28, 2005. The
 10 said witness was satisfactorily identified and duly
 11 sworn before the commencement of her testimony; that
 12 the said testimony was taken stenographically by
 13 myself and then transcribed by myself. To the best
 14 of my knowledge, the within transcript is a complete,
 15 true and accurate record of said deposition.
 16
 17 I am not connected by blood or marriage with any
 18 of the said parties, nor interested directly or
 19 indirectly in the matter in controversy.
 20
 21 In witness whereof, I have hereunto set my hand
 22 this 4th day of January, 2006.
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1 SIGNATURE PAGE/ERRATA SHEET
 2 RE: Nancy Rosario, Individually, as she is the
 3 Administratrix of the Estate of Awilda Santiago,
 4 Essex Probate Court Docket #03P-2499AD1,
 5 P/P/A Veronica Rosario and Christina Santiago,
 6 and as she is the Administratrix of the Estate
 7 of Jose Santiago, Berlin (Connecticut) Probate
 8 Court, Case #03-0713
 9
 10 December 28, 2005
 11 Deposition of Kristin O'Donnell
 12
 13 I, KRISTIN O'DONNELL, do hereby certify that I
 14 have read the foregoing transcript of my testimony
 15 and further certify that it is a true and accurate
 16 record of my testimony (with the exception of the
 17 following changes listed below):
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 19 Page Line Correction
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JUDE CONNELLY, Sworn.

Q. (MacDougall.) Good morning, Mr. Connelly. In a loud, clear voice could you please introduce yourself to the grand jury.

A. Hello. My name is Jude Connelly.

Q. Spell your first and last name, sir.

A. J-u-d-e C-o-n-n-e-l-l-y.

Q. Mr. Connelly, how old are you?

A. I'm 18.

Q. Where do you live, sir?

A. I live in Harvard, Mass.

Q. How long have you lived in Harvard, Mass.?

A. I've lived in Harvard since 1998.

Q. Sir, do you know an individual named Jeffrey Southworth?

A. Yes, I do.

Q. How do you know him?

A. Well, I dirt-bike with him a lot, and I know him from dirt-biking and dirt bike racing in particular.

Q. When you say you dirt-bike with him, what do you mean by that?

1
2 A. We race-- we race and we train together.

3 Q. Is there a number of people that train together in the
4 Harvard area?

5 A. Yes.

6 Q. How long have you known Jeffrey Southworth?

7 A. At most a year.

8 Q. Sir, drawing your attention to Friday, September 26th
9 of this year, do you remember that day?

10 A. Yes.

11 Q. Were you with Jeffrey Southworth on that day?

12 A. Yes.

13 Q. When did you first come to come in contact with Mr.
14 Southworth on September 26th?

15 A. I was previously out dirt-biking in Templeton,
16 Massachusetts, and he came out to meet me later, and
17 we were going to practice.

18 Q. Is there a particular area in Templeton that is set up
19 to practice dirt-biking?

20 A. Yes.

21 Q. Where is that?

22 A. It's near the landfill in Templeton. There's a sand
23 pit and there's also-- we actually know a few people
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from the Harvard area who own land that have actual tracks set up there.

Q. What time did you first run into Jeffrey Southworth at the sand pits in Templeton?

A. In the time of I would say five o'clock to 5:30.

Q. How did you get to Templeton?

A. I went with another friend, who dirt-bikes, from the area, and he actually had to leave because he had to go take his kid-- he had to go pick up his kid.

Q. So you had gotten a ride there and then your ride left?

A. Yes, yes.

Q. Do you know how Mr. Southworth got to Templeton?

A. Yes.

Q. Did you see him arrive?

A. No.

Q. How do you know how he got there?

A. Well, he came with-- he came with this other person Scott.

Q. Was that Scott Espey?

A. Yes, that's Scott Espey.

1

2

Q. Did they both arrive at about five o'clock or shortly
after five o'clock?

3

4

A. Yes.

5

6

Q. Were any of you eating or drinking while you were
dirt-biking?

7

8

A. No, besides water.

9

10

Q. How long did you dirt bike for?

11

12

A. Until like it was dark. I mean, I can't quite
remember the time it gets dark, some time between six
and seven.

13

14

Q. When it became too dark to dirt bike, you stopped?

15

16

A. Yes.

17

18

Q. At that point who else is there?

19

20

A. At that point it was myself, Jeff, and Scott.

21

22

Q. By Jeff do you mean Jeff Southworth?

23

24

A. Yes, and Scott Espey.

25

Q. How old is Jeff Southworth, if you know, is he older
than you?

A. Yes, he's older than me.

Q. At some point did you leave that area in Templeton?

A. Yes.

Q. What time was that?

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A. I believe around eight or shortly after.

~~Q. Who left that area together?~~

~~A. I left with Jeff Southworth and Scott Espey.~~

~~Q. How did you leave?~~

~~A. We left in a truck that Jeff had rented.~~

Q. What kind of a truck was it?

A. It was a Dodge Dakota, I believe, a green one.

Q. Did you have equipment with you--bikes and other equipment for dirt-biking?

A. Yes.

Q. Where did that equipment go?

A. Well, one of the persons that I was with actually took my equipment, and the rest of the equipment--Jeff's equipment and Scott's equipment--went with us.

Q. What kind of-- in terms of a pickup truck, did it have a cab that could seat two, three?

A. It had like four normal car doors, so I would say it could fit five people.

Q. In addition to the three of you human beings, were there any other creatures with you?

A. Yes, there were two dogs.

Q. Whose dogs were those?

1

A. Those were Jeff's.

2

3

Q. ~~What kind of dogs were they?~~

4

A. ~~They were Rottweilers.~~

5

Q. ~~Where did they travel; did they travel in the back or~~

6

~~did they travel in the passenger compartment?~~

7

A. They traveled in the back.

8

Q. Where did you go from Templeton, the three of you?

9

A. We went to in Leominster, Massachusetts the Longhorn

10

11

Bar and Grill, The Longhorn something, Veal

12

House/Steakhouse.

13

Q. Who drove from Templeton to Leominster?

14

A. Scott did.

15

Q. Scott Espey?

16

A. Yes.

17

Q. When you arrived at the Longhorn, was it the Longhorn

18

Steakhouse?

19

A. Well, I know it's the Longhorn something. I don't

20

21

remember specifically.

22

Q. When you arrived at the Longhorn, did you meet anyone

23

you knew there?

24

A. Not right away, but we called a few people to come

25

down and meet us there, yes.

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Q. With ~~respect to calling~~ people, do you have a cell phone?

A. Yes, I did.

Q. What is your cell phone number?

A. My cell phone number is (978) 239-6954.

Q. Do you know whether Jeff Southworth had a cell phone on him that day?

A. Yes, he did.

Q. Did Scott Espey have a cell phone with him?

A. Yes, he did.

Q. Did you have either or both of their cell phones in your cell phone?

A. Yes, I did.

Q. What time would you say that you met up with these other people at the Longhorn?

A. Shortly after nine o'clock.

Q. How many people were there total by the time all of you were there?

A. There were six people.

Q. There was you?

A. (Witness nodding.)

1
2 Q. Jeff Southworth?

3 A. (~~Witness nodding.~~)

4 Q. ~~Scott Espey?~~ Who were the other people?

5 A. I'm sorry, ~~I'm~~ wrong there were seven people.

6 Q. Who were the other people?

7 A. I don't know specifically all of their names. I know
8 Scott Espey's brother Michael Espey was there, another
9 person by the name--that lives in Harvard, his name is
10 Todd Currie, and the other two they were visiting from
11 Vermont or somewhere. Mike Espey was familiar with
12 them.
13

14 Q. Were they friends of Mike Espey's from out-of-town?

15 A. Yes.

16 Q. At some point did you all sit down for dinner?

17 A. Yes.
18

19 Q. Now, when you were waiting for dinner, what part of
20 Longhorn did you wait in?

21 A. Well, we originally had to wait for seating, so we
22 waited over in the bar area; and after we had been
23 seated, we all moved over to our table.

24 Q. When you were waiting in the bar area, was anyone
25 drinking?

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A. Yes.

Q. Who was drinking?

A. Everybody but me.

Q. So six of them other than you?

A. Yes.

Q. Specifically with respect to Jeff Southworth, was he drinking in the bar area?

A. Yes.

Q. Do you remember what he was drinking?

A. He was drinking beer.

Q. Do you remember what kind of beer?

A. It was in a mug so it was on tap.

Q. So you saw him with a mug?

A. Yes.

Q. Was it a regular 12 ounce mug or was it a larger one than that?

A. I would say, yeah, it was over 12 ounces, I would say.

Q. When you were seated, once your table was available, do you know if you checked out at the bar or did the tab move to the table?

A. I'm pretty sure we checked out at the bar, yeah.

Q. Once you sat down at the table, did people order food?

1

2

A. Yes.

3

Q. Did people ~~also order additional~~ rounds of drinks?

4

A. Yes.

5

Q. What was Jeff Southworth drinking at the table?

6

A. He was also drinking beer later, and he also had a drink. I'm not specific on the name, but I know that it has Jack Daniels in it.

9

10

Q. Could it have been a Manhattan?

11

A. Yes.

12

Q. Was there a cherry in the drink?

13

A. Yes.

14

Q. Were other people ~~drinking those~~ same drinks in addition to Jeff Southworth?

15

16

A. Yes.

17

18

Q. Was that the main drink at the table?

19

A. Well beer was, I would say, over that drink.

20

Q. As you sat at the table, did everyone continue to drink other than you?

21

22

A. Yes.

23

Q. How long were you at the Longhorn?

24

25

A. We were there until it closed, which I believe was 11 o'clock, so until around 11 o'clock.

1

2

Q. At that point did you all pay for everything you had--
your meals and your drinks you had at the table?

3

4

A. Everyone except me. Jeff paid for me.

5

Q. Fair to say he paid cash?

6

A. Yes.

7

8

Q. Or you all paid cash, I understand you didn't pay
cash.

9

10

A. Yes.

11

Q. When you left the table, were there any drinks left on
the table that had not been consumed?

12

13

A. I don't believe so.

14

Q. Did you continue to pay any attention to what Jeff
Southworth was drinking during the course of dinner?

15

16

A. Not specifically. I sat across the table from him not
directly but at a diagonal, and I mean, I noticed what
he was drinking, but I didn't like, you know, keep a
count specifically.

17

18

19

20

21

Q. What do you believe Jeff Southworth had to drink at
the table that night?

22

23

A. I would say that he had probably two to three beers
and a couple Manhattans. I would say he had two, maybe
three. I can't specifically recall.

24

25

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Q. At any point did you notice any changes in Jeff Southworth as a result of what he was drinking?

3

4

A. Not in particular, no.

5

6

Q. When you left the Longhorn, how did you leave?

7

A. We left in the same truck that we came in.

8

Q. Were the same three people in that truck?

9

A. Yes.

10

Q. Who was driving at that point?

11

A. Scott Espey was still driving.

12

Q. The dogs still in the truck?

13

A. Yes.

14

Q. Did you to leave as a group, meaning all seven of you that had been at dinner?

15

16

A. Yes. We had two cars.

17

18

Q. So the other four of them were in a second car?

19

A. Mm-hmm.

20

Q. Where did you go from the Longhorn?

21

A. We left the Longhorn, and we went to the hotel that the two other people from out of town were staying at in Fitchburg. I believe it's called the Four Seasons.

22

23

24

Q. That was also in Fitchburg, Massachusetts?

25

A. Yes.

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Q. When you went to the hotel, did you go to a room?

A. Yes.

Q. Was that the room that the two friends of Mike Espey were staying in?

A. Yes.

Q. Were all seven of you at this point in the room?

A. Actually, we weren't in the room. We were right outside the room.

Q. Inside or outside?

A. Outside.

Q. Outside the room but inside or outside?

A. Inside the hotel, right in the corridor next to the room.

Q. How long did you stay in that area?

A. I would say 15 to 20 minutes, not very long.

Q. What were you doing during that 15 to 20 minutes?

A. Well we were waiting for a few of the kids-- the kid that were from out of town were waiting to hear from another friend. They were going to meet up with him later on in Fitchburg.

Q. At some point did you all leave that hotel?

A. Yes, we did.

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Q. Now, during that fifteen to twenty minutes you were waiting outside the room, was anything eaten or had to drink by anybody?

A. Yes.

Q. What was that?

A. Beer.

Q. Who was drinking beer?

A. Everyone was drinking beer besides me.

Q. Specifically was Jeff Southworth drinking beer?

A. Yes.

Q. Do you remember what kind of beer that was?

A. I believe it was Bud Light or something light, I know that.

Q. Was he drinking it out of a can or a bottle?

A. A can.

Q. Do you know where that Bud Light or whatever it was had come from?

A. I don't specifically.

Q. During the time that you were in Jeff Southworth's truck, did you at any time notice a cooler?

A. I did not.

Q. So you didn't see a cooler in Jeff's truck anywhere?

1

2

A. No.

3

Q. So you said-- how many beers do you believe Jeff

4

Southworth drank during that 15 to 20 minutes you were
at the hotel?

6

A. I would say only one.

7

Q. How did you leave the hotel?

8

A. We left once again in the truck that we came in.

9

10

Q. Were the other four in the other vehicle?

11

A. No. Actually we had one of the others, so there were
three in the other vehicle, and we had one other.

12

13

Q. Do you remember who that was, was that one of the
people from New York or someone you knew?

14

15

A. That was Mike Espey.

16

17

Q. So it was you, Mike Espey, Scott Espey, and Jeff?

18

A. Yes.

19

20

Q. Who drove from the hotel?

21

A. Scott did.

22

Q. Where'd you go?

23

A. We went to The Other Side in Fitchburg.

24

Q. What kind of establishment is The Other Side?

25

A. It's a men's entertainment bar.

26

Q. Is it a strip club?

1
2 A. Yes.

3 Q. When you got to The Other Side, did you stop the car;
4 did Scott stop the car?

5 A. Yes.

6 Q. Did you all go in?

7 A. No, we didn't. We dropped off Mike Espey with the
8 other three that had gone in the other car; and the
9 three of us, Scott Espey, Jeff Southworth, and I
10 decided that we weren't going to go in and that we
11 were going to go home.
12

13 Q. In order to go home what did you do?

14 A. Scott drove Jeff and I to Littleton, Mass. so we could
15 pick up Scott's truck.
16

17 Q. Do know where Scott's truck was?

18 A. It was at an apartment or condominium complex off the
19 side of-- off 495 right in Littleton. I believe it's
20 called Pondview.

21 Q. Had he just left his truck there for convenience or
22 did he know someone there, or do you know why Scott
23 Espey's truck was at that location?
24
25

1

2

A. He left it there out of convenience, but also he has a

3

relative, I believe it's his grandmother who lives

4

within the complex.

5

Q. Where does Scott Espey live?

6

A. He lives in Harvard, Mass.

7

8

Q. You indicated you also live in Harvard?

9

A. Yes.

10

Q. Where does Jeff Southworth live?

11

A. He lives New Hampshire.

12

Q. Did he used to live in Harvard?

13

A. Yes.

14

Q. But currently he lives in New Hampshire?

15

A. Yes.

16

17

Q. When you got to the Pondview Apartments in Littleton,
what happened?

18

19

A. First we unloaded all my stuff--well, what I had left

20

of my stuff, and Scott leaves his stuff usually with

21

Jeff. So we got our stuff out, and you know, got it

22

off the truck and Jeff left, and we went over and put

23

my stuff in Scott's truck.

24

25

Q. I'm just going to stop you for one second. When you
say Jeff left, how did Jeff leave?

1

A. He drove out of there in the Dakota.

2

3

Q. That was the truck you indicated he had rented?

4

A. Yes.

5

Q. Who was ~~with~~ Jeff Southworth when he left?

6

A. Only his two dogs.

7

8

Q. At this point are the dogs in the back or are they in the passenger compartment?

9

10

A. Well, I mean, they were always inside the truck. They weren't in the bed of the truck, but they were in the back.

11

12

13

Q. Now, you said you were putting your stuff in Scott Espey's truck?

14

15

A. Yes.

16

17

Q. Was Scott Espey going to give you a ride home?

18

A. Yes.

19

Q. What was the next thing that happened?

20

A. Well, we realized that we did not-- Scott didn't have the keys, he left them in Jeff's truck, so we called him on the cell phone.

21

22

23

Q. Do you know what time it was at this point, Mr. Connelly?

24

25

1

2

A. When we first called him, I would say it was around 1145.

3

4

Q. Who called him, if you know?

5

A. I did.

6

Q. Were you able to reach him?

7

A. Yes.

8

Q. What, if any conversation, did you have with him at that time?

10

A. Well, I told him that we did not have our keys, and we left them in the truck, and that he would have to come and turn around and give us the keys, and he agreed.

11

12

Q. Did you talk to him once or more than once at that time?

14

15

A. At that time we talked to him once.

16

17

Q. During-- When you talked him at about 11:45, did you have any difficulty maintaining a signal when talking to him?

18

19

20

A. Yes, yes.

21

Q. So even though you had one conversation, did it involve calling him more than once?

22

23

A. Yes.

24

25

1

2

Q. You said you told him that he had the keys and he just come back?

3

4

A. Yes.

5

6

Q. Did he indicate where he was at that time, how far he had gotten?

7

8

A. No.

9

10

Q. Did he give you any estimate about how long it would take him to get back?

11

12

A. No, he didn't. I assumed-- I mean, it was very shortly after, within five minutes of him leaving, so I assumed it would be five, maybe ten minutes.

13

14

Q. At that point you were at the Pondview Apartments in Littleton just off 495?

15

16

A. Yes.

17

18

Q. What happened after you hung up with Jeff after he said he would come back?

19

20

A. Well, Scott and I waited at the truck in Pondview Apartments for about 15 to 20 minutes before realizing that Jeff wasn't showing up, at which point we tried calling him on the cell phone again.

21

22

23

24

25

Q. Who called him this- so now, it's around midnight, is that fair to say?

1

A. Yes.

2

3

Q. Who called him?

4

A. We both tried calling him. You know, we really just wanted to get through to him and find out what was going on at that point.

5

6

7

Q. Were you able to-- were either you or if you know Scott Espey able to reach him initially?

8

9

A. One of us was. I can't recall exactly which one, but we were able to reach him.

10

11

12

Q. What, if anything-- did you specifically speak to him at that point?

13

14

A. I cannot recall, I cannot.

15

16

Q. At some point did you learn why he wasn't back there?

17

A. Yes.

18

19

Q. What did you learn?

20

A. He said he was in an accident.

21

Q. Did he say what kind of accident?

22

A. No.

23

Q. Did he indicate whether it was an accident by himself or with another vehicle?

24

25

A. No, he did not.

Q. Did he make any request of you or Scott Espey?

1

2

A. He said, "I'm in an accident, come get me."

3

Q. Did he tell you where he was?

4

A. No.

5

Q. Do you know if he told Scott Espey where he was?

6

A. I don't believe so.

7

8

Q. Did he indicate who was driving his vehicle at the time of accident?

9

10

A. I believe it was him, but he did not indicate.

11

Q. But when you had last saw him, he was the only one in his truck?

12

13

A. He was driving, yes.

14

Q. What's the next that happened, Mr. Connelly?

15

16

A. Well, we had to break one of the windows in Scott Espey's truck, so we could get to his spare key. We got the spare key, and we decided, you know, we wanted to go see if he was all right; we were very worried about him. So we got on 495 north, and we drove up, you know, five/ten minutes, and we didn't see anything on the north side. But when we got in between I think it was right before Westford, we saw on the south side of 495 there was lots of police cars, and it looked like what would be an accident.

17

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1
2 Q. Who was driving the truck at that point?

3 A. I was driving the truck.

4 Q. Did you notice anything about the weather conditions
5 or your ability to drive at that time?

6 A. No, I did not.

7 Q. Fair to say you were-- what speed were you traveling?

8 A. I would say in the range of 60 to 70 miles an hour.

9
10 Q. What, if anything, did you do as a result of seeing
11 what looked like an accident scene on the southbound
12 side of 495?

13 A. We went to the next exit, which is Boston Road,
14 Westford, and we turned around so we could head back
15 down the south side of 495.

16 Q. What, if anything, happened next?

17
18 A. We drove right by the accident scene. At that point
19 we didn't know whether it was the accident scene or
20 not, but we just assumed it was.

21 Q. Did you see Jeff Southworth?

22 A. No.

23 Q. Did you see the truck, the Dakota?

24 A. No, we didn't.

25 Q. What, if anything, did you do next?

1

A. We drove around again.

2

3

Q. ~~Meaning~~ drove?

4

A. ~~Drove~~ up 495 North and then turned around.

5

Q. ~~And~~ turned back south?

6

A. ~~To~~ see if we could see anything the second time.

7

Q. Did you see anything the second time?

8

A. No, we did not.

9

10

Q. By this time what time was it?

11

A. I would say it was around 12:45, getting towards 1
o'clock.

12

13

Q. Did you have any further phone contact with Jeff
Southworth?

14

15

A. No. We tried calling him several times, but we never
got through to him after that one.

16

17

Q. Did you get his voicemail or did you just not get
through it all?

18

19

20

A. We got his voicemail.

21

Q. Did you leave him any kind of a message?

22

A. I believe we did leave him one, if not two, messages.

23

Q. At some point did you go home?

24

A. Yes.

25

Q. So you said you drove by the accident scene twice?

1

A. Yes.

2

3

Q. ~~Didn't~~ see Jeff?

4

A. ~~Yes.~~

5

Q. ~~Didn't~~ see Jeff's truck?

6

A. ~~Yes.~~

7

Q. Could you see any vehicles that appeared to be
involved in the crash?

8

9

A. Not at all.

10

11

Q. What did you see in terms of an accident scene?

12

A. Well, we couldn't see much of anything. I mean, it
must have-- It was in the woods. What we could see
was just the side of the street. They had-- I
believe it was just the fast lane for the traveling
cars and they had the other two lanes blocked off with
police vehicles and such for stuff.

14

15

16

17

18

19

Q. So only the left lane was open on the southbound side?

20

A. Yes.

21

Q. What time did you arrive home?

22

A. I arrived home around 1:30, maybe.

23

24

Q. Did you have any further contact with Jeff Southworth
that night?

25

A. No.

1
2 Q. Have you had any contact with Jeff Southworth since
3 then

4 A. No, ~~I have~~ not.

5 Q. Now, sir, you indicated that when you were at the
6 Longhorn you didn't notice any changes in Jeff
7 Southworth's demeanor. At any time did you notice any
8 changes in his demeanor?
9

10 A. No.

11 Q. Have you been with Jeff Southworth before when he's
12 been drinking?

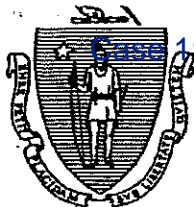
13 A. Very rarely.

14 Q. So have you ever seen Jeff Southworth when you
15 believed him to be under the influence?
16

17 A. No.

18 MS. MACDOUGALL: I have no further questions
19 for this witness. Do any of the grand jurors have
20 questions for this witness?

21 (Witness Excused.)
22
23
24
25



MITT ROMNEY
GOVERNOR

KERRY HEALEY
LIEUTENANT GOVERNOR

EDWARD A. FLYNN
SECRETARY

COLONEL THOMAS J. FOLEY
SUPERINTENDENT

Case 1:05-cv-70617-MBB Document 27-14 Filed 05/10/2007 Page 1 of 3

The Commonwealth of Massachusetts
Department of State Police

Collision Analysis and Reconstruction Section
485 Maple Street
Danvers, MA 01923
978.538.6065

To: Lieutenant Stephen R. Benanti
Commanding Officer, C.A.R.S.

From: Trooper Kerry A. Alvino #1374

Subject: Two Vehicle Rear-End Double Fatal Collision

Sir,

01. The following reconstruction report summarizes an investigation conducted at the request of and in conjunction with the MA State Police A-3 Concord Barracks. The scope of this Trooper's involvement was limited to the reconstruction of the collision.

SYNOPSIS

02. It should be noted that the following synopsis is nothing more than a brief outline or general summary of the facts surrounding the events that occurred on Saturday, 27 September 2003 at approximately 0010 hours. This synopsis should not be considered a factual report of what actually transpired, but rather be employed to gain an overview of what occurred. The purpose of this synopsis is to assist the reader of this report in understanding the kinematics of the collision delineated here.

03. On Saturday, 27 September 2003 at approximately 0010 hours, Jose A. Santiago, H/M, DOB 4-19-70, OLN [MA] 584834267 (status "suspended" as of 12-12-94), of 112 Beaver Street in New London, CT was traveling on Route 495 SB in the town of Westford. He was operating a 1993 Honda Accord bearing PA registration FCF5450 (hereinafter referred to as the "Honda" or the "Accord"). The Honda is owned by Luz I. Diaz of 831 Elm Street in Reading, PA. Mr. Santiago had the following four passengers in the Honda:

1. Julia M. Schmidt, DOB 3-25-80, of 86 Gold Street, 1st floor, in New London, CT, the girlfriend of Jose Santiago, was seated in the right front passenger seat.
2. Christina Santiago, DOB 5-23-91, of 5 Washington Street in Lawrence, MA, the daughter of Jose Santiago, was seated in the right rear passenger seat.

3. Awilda Santiago, DOB 6-16-90, of 5 Washington Street in Lawrence, MA, the daughter of Jose Santiago, was seated in the middle rear passenger seat.

4. Veronica Rosario, DOB 5-16-92, of 5 Washington Street in Lawrence, MA, the daughter of Jose Santiago, was seated in the left rear passenger seat.

Mr. Santiago had picked his three daughters up in Lawrence and was taking them to his home in Connecticut to spend the weekend with them.

04. Simultaneously, Jeffrey T. Southworth, W/M, DOB 1-13-81, OLN [MA] S78712050 (status "suspended"); of 171 Gates Street in Portsmouth, NH was traveling on Route 495 SB in Westford. He was operating a 2003 Dodge Dakota bearing NH registration 1506670 (hereinafter referred to as the "Dodge" or the "Dakota" or the "pick-up"). The Dodge is owned by Enterprise Rent-a-Car of Boston, Inc. out of 6 Perimeter Road in East Londonderry, NH. Except for his two dogs, Mr. Southworth was alone in the pick-up. Located in the bed of the Dodge were two motorized dirt bikes along with protective riding gear in a duffle bag. Mr. Southworth has ties to the Harvard, MA area, and it is possible that is where he was headed.

05. According to a witness, in the area of Route 495 SB south of Exit 32, Boston Road, Mr. Santiago's Honda was traveling at approximately 60-65 MPH in the center travel lane. Jeffrey Southworth was operating his Dodge at a very high rate of speed. He came upon the slower moving Honda and rear-ended the Honda most likely initially pushing the Honda to the left. Mr. Santiago steered right in an attempt to regain control of his Honda. The Accord entered a right bearing centripetal yaw and began to rotate in a clockwise direction as it veered to the right. The Honda left the travel portion of the roadway and entered the road shoulder. It is possible, in this area, that a secondary, minor collision occurred between the Honda and the Dodge as they crossed paths. One of the vehicles impacted a large Route 495 highway sign located on the road shoulder just off the edge of the asphalt. The sign stanchions were ripped from the ground, and the sign came to rest close to the tree line. The Honda continued rotating and sliding across the grassy shoulder. In the area of the tree line, approximately 40-50 feet from the edge of the road, the left side tires of the Honda dug into the grassy shoulder causing the vehicle to "trip". As the vehicle rolled into the woods, its roof was torn off. The occupants of the Honda were thrown from the vehicle. The Honda came to rest upright facing in a southwesterly direction approximately 20 feet into the woods. The occupants were scattered about the area around the Accord.

06. Following the initial collision with the Honda, the Dodge also veered off towards the right road shoulder. It seems likely that in the area where the Route 495 Highway sign was impacted on the road shoulder, the right front tire of the Dodge came into contact with the left rear corner of the Honda in a minor secondary collision. The rear bumper cover of the Honda was found in this area with distinct tire rub marks on its left side that were made by the right front tire of the Dodge. The pick-up continued across the road shoulder and entered the wooded area approximately 100 north of the Honda. The right front portion of the Dodge impacted numerous small trees and

branches before the vehicle came to rest. The pick-up stabilized facing in a westerly direction approximately 5-10 feet into the woods.

07. After the crash occurred, Julia Schmidt was the only conscious occupant of the Honda. She ran to the edge of the road and attempted to flag down passing motorists. Terry Essary, DOB 9-5-70, traveling southbound on Route 495 in Westford, stopped to assist. Mr. Essary observed Jeffrey Southworth emerge from the woods in the area south of the location of the Honda. He later saw Mr. Southworth talking with the occupant of a vehicle that pulled over to assist. It was later learned that Mr. Southworth was attempting to get a ride to flee the scene.

08. Responding EMS personnel located Jose Santiago and his three daughters scattered about the area around their Honda. Jose Santiago and his daughter Awilda Santiago were pronounced dead at the scene. Christina Santiago was taken by ambulance to Children's Hospital in Boston with serious injuries. Veronica Rosario was initially taken to Lowell General then transferred to NE Medical Center with critical injuries. Julie Schmidt was transported by ambulance to Emerson Hospital in Concord with minor injuries. At approximately 0200 hours, personnel from the Office of the State Medical Examiner arrived on scene to transport the bodies of Jose and Awilda Santiago to their facility in Boston where autopsies were subsequently performed by Dr. Abraham Philip. The cause of death of Jose Santiago was listed as multiple injuries due to blunt trauma while the cause of death of Awilda Santiago was blunt trauma to the torso with a crushed spine. When police personnel arrived on scene, Jeffrey Southworth had fled the area. Upon the completion of the on-scene investigation, both vehicles were towed by Ferreira's Towing to A-Troop Headquarters in Danvers where they were secured for further examination.

09. At approximately 0710 hours, Jeffrey Southworth was located at the Residence Inn on 7 Lan Drive (just off of Rte. 110 approximately 3 miles from the location of the crash) in Westford. He was placed under arrest by Tpr. Brad Kessel of the Concord Barracks. Mr. Southworth stated to Tpr. Kessel that he was in the Dodge when the crash occurred, but a friend was driving the vehicle at the time of the collision. Jeffrey Southworth was transported to A-3 for booking. Photographs of Mr. Southworth's injuries were taken by Sgt. Michael Holleran of the MSP Crime Scene Services Section at Devens. A search warrant to obtain a blood sample from Jeffrey Southworth was authorized by Judge Dilsday and obtained by Tpr. Kessel at approximately 1145 hours. Mr. Southworth was subsequently transported to Emerson Hospital where his blood was drawn by Carol Hood. The blood sample was transported to the MA State Police Crime Lab for chemical analysis.

ROADWAY DESCRIPTION

10. This collision occurred on **Route 495** in the town of Westford. Route 495 is a public way as defined under MGL C. 90, s. 01 that runs generally north and south. The locus of this collision was southbound approximately ½ mile north of Exit 31, Route 119. Here, the north and southbound sides of the roadway are separated by a treed and



GABRIEL & SWEENEY
COURT REPORTING

Transcript of the Testimony of:
Nancy Rosario

In the Case of:
Nancy Rosario
vs.
Rare Hospitality International, Inc., d/b/a Longhorn
Steakhouse

Taken on:
July 25, 2006

Gabriel & Sweeney Court Reporting
15 Van Wart Path | 19 Summer Street
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(617) 964-1321 Fax (978) 263-0669
email: gsreporting@yahoo.com

<p style="text-align: right;">Page 97</p> <p>1 Q. So just to go through the insurance, it's your 2 understanding that Mr. Santiago's vehicle that 3 your children were in that evening did not carry 4 insurance, correct? 5 A. That's correct. 6 Q. And what you know of Mr. Southworth's vehicle, 7 being a New Hampshire vehicle, there was no 8 insurance that paid for the medical bills for your 9 children, correct? 10 A. Yes. 11 Q. Okay. And do you have -- back in 19 -- excuse me. 12 Back in 2003, in September, when this accident 13 occurred, did you have any vehicles in your 14 household, either you or Mr. Garcia? 15 A. Yes. Mr. Garcia. 16 Q. He did -- what vehicle did he have back in 17 September of 2003? 18 A. He had a Toyota. 19 Q. Okay. Was it insured? 20 A. Not at the time. 21 Q. You've filed a separate lawsuit in Middlesex 22 Superior Court against Mr. Southworth and 23 Enterprise Rent-A-Car of Boston, correct? 24 A. Yes.</p>	<p style="text-align: right;">Page 100</p> <p>1 MR. ALBERT FARRAH: John Fitzgerald. 2 MR. GILLIS: I know it's quarter past 12. 3 Maybe it's a good time to take a break? 4 MR. ALBERT FARRAH: Lawyers do that all 5 the time. I think that's a great idea. 6 MR. GILLIS: Let's go off the record. 7 THE VIDEOGRAPHER: The time is 12:14. 8 This is the end of Cassette Number 1. We are off 9 the record. 10 (Discussion held off the record.) 11 (Lunch break was taken.) 12 13 14 15 16 17 18 19 20 21 22 23 24</p>
<p style="text-align: right;">Page 98</p> <p>1 Q. Okay. Have you received any insurance payments in 2 that case? 3 A. My lawyers know about that. 4 MR. ALBERT FARRAH: I can tell you on the 5 record. 6 MR. GILLIS: Sure. 7 MR. ALBERT FARRAH: The case has been 8 settled. There has been a total payment -- I 9 think it's part of the record in that case, if you 10 go to Middlesex. Total payment was \$300,000 from 11 Jeffrey Southworth, and \$35,000 from Enterprise 12 Rent-A-Car of Boston, Inc. 13 MR. GILLIS: Okay. So as far as 14 collateral sources to this point, there's no PIP? 15 MR. ALBERT FARRAH: No PIP. 16 MR. GILLIS: There's no under insurance? 17 MR. ALBERT FARRAH: (Shakes head side to 18 side.) 19 MR. GILLIS: And there's a total paid out 20 in the other lawsuit of \$335,000, correct? 21 MR. ALBERT FARRAH: Correct. 22 MR. GILLIS: And is that lawsuit now -- 23 MR. ALBERT FARRAH: Dismissed. 24 MR. GILLIS: -- dismissed?</p>	<p style="text-align: right;">Page 101</p> <p>1 AFTERNOON SESSION 2 (Readback.) 3 THE VIDEOGRAPHER: The time is 1:06 p.m. 4 This is the beginning of Cassette Number 2 in the 5 deposition of Nancy Rosario. We are on the 6 record. 7 CONTINUED EXAMINATION BY MR. GILLIS: 8 Q. Good afternoon, Ms. Rosario. A couple things that 9 I'd like to clear up from an earlier part of the 10 session. 11 First has to do with your testimony as to 12 the -- any rehabilitation that you've gotten for 13 drugs or alcohol. 14 My understanding is that prior to your 15 death of your daughter Awilda, you had gotten some 16 treatment for drug abuse, is that correct? 17 MR. ALBERT FARRAH: Objection to the 18 form. Prior to the -- prior to the death of 19 Awilda, did you get any treatment for drug abuse? 20 A. I don't understand. Can you repeat that to me? 21 Q. You testified this morning that you had gone to a 22 halfway house in Lynn prior to the death of your 23 daughter Awilda, is that correct? 24 A. No, that's not --</p>
<p style="text-align: right;">Page 99</p> <p>1 MR. ALBERT FARRAH: And Southworth is 2 released. 3 MR. GILLIS: And Southworth is released. 4 Q. Other than the payments in that lawsuit, have you 5 received any money whatsoever concerning this 6 accident, from any source? 7 MR. ALBERT FARRAH: And the SSI, the 8 survivor's benefits. 9 MR. GILLIS: Okay. 10 Q. Other than the survivor benefits? 11 A. No, no. 12 Q. And as far as insurance is concerned, while we're 13 on this issue, maybe you can -- are there any 14 liens outstanding in this case? Or were they all 15 resolved in the first place? 16 MR. ALBERT FARRAH: Neighborhood Health 17 Plan still has a lien for approximately 40 or 18 \$50,000. I can get you a copy of the settlement, 19 if you want. 20 MR. GILLIS: And was there a settlement 21 petition filed in the Middlesex court for a minor? 22 MR. ALBERT FARRAH: I'm sorry? Yes, 23 settlement for a minor. A GAL was appointed. 24 MR. GILLIS: Who was the GAL appointed?</p>	<p style="text-align: right;">Page 102</p> <p>1 MR. ALBERT FARRAH: It's the form of the 2 question. 3 Q. Did you ever seek treatment at a halfway house in 4 Lynn? 5 A. Yes. 6 Q. Okay. Was that while Awilda was still alive? 7 A. Yes. 8 Q. Okay. Before her death in September of 2003 did 9 you have any other treatment for drug or alcohol 10 abuse? This is before she died. 11 A. No. 12 Q. Okay. After she died, did you receive some drug 13 and alcohol treatment? 14 A. Yes, I did. 15 Q. Where did you receive that treatment? 16 A. At the Holy Family. 17 Q. And what was the nature of that treatment? Why 18 did you go to Holy Family? 19 A. Depression. 20 Q. Were you using any drugs or alcohol at that point? 21 A. Yes, I was. 22 Q. What drugs and/or alcohol were you using at that 23 time? 24 A. I was using cocaine, and I was drinking beer at</p>

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS)
SHE IS THE ADMINISTRATRIX OF THE)
ESTATE OF AWILDA SANTIAGO, ESSEX)
PROBATE COURT DOCKET #03P-2499AD1 and)
AND AS SHE IS THE ADMINISTRATRIX OF)
THE ESTATE OF JOSE SANTIAGO, BERLIN)
(CONNECTICUT) PROBATE COURT,)
CASE #03-0713 AND NANCY ROSARIO AND)
MICHAEL MILLER, AS GUARDIANS OF)
CHRISTINA SANTIAGO AND VERONICA)
ROSARIO, ESSEX PROBATE COURT DOCKET)
#06p-0507GM)

Civil Action #05-CV-10617MLW

Plaintiffs

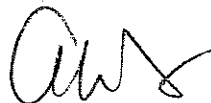
v.

RARE HOSPITALITY INTERNATIONAL, INC.)
d/b/a LONGHORN STEAKHOUSE)

Defendant

RULE 26 REPORT OF DAVID M. BENJAMIN, PH.D.

Plaintiffs
By their attorney,



ALBERT L. FARRAH, JR., ESQ.
One Washington Mall, 5th Floor
Boston, MA 02108
(617) 742-7766
B.B.O. #159340

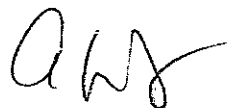
Date: October 31, 2006

CERTIFICATE OF SERVICE

SUFFOLK, SS

October 31, 2006

A copy of the Rule 26 Report of Dr. David M. Benjamin, Ph.D. was today HAND DELIVERED to Michael Gillis, Esq., Gillis & Bikofsky, P.C., 1150 Walnut Street, Newton Highlands, MA

A handwritten signature in dark ink, appearing to read 'ALF', is written above a horizontal line.

Albert L. Farrah, Jr., Esq.

David M. Benjamin, Ph.D. Rule 26 Report Index

1. Report dated October 18, 2006, with attachments
2. Other cases in which expert has testified
3. Qualifications and publications
4. Exhibits to be used as a summary of, or as support for the opinions, of David M. Benjamin, Ph.D

David M. Benjamin, Ph.D.

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DAVID M. BENJAMIN, Ph.D.
CLINICAL PHARMACOLOGIST & TOXICOLOGIST

New Email: medlaw@doctorbenjamin.com

October 18, 2006

Albert L. Farrah, Jr., Esq.
One Washington Mall
Boston, MA 02108

Re: Nancy Rosario, et al v. RARE Hospitality, Inc. d/b/a Longhorn Steakhouse

Dear Attorney Farrah:

Pursuant to your request, I am submitting my report regarding my analysis of this case pursuant to the format established by FRCP 26.

Summary of Qualifications

My qualifications to review this case are based on my learning, training and more than 30 years of experience as a Clinical Pharmacologist and Toxicologist, my standing as a nationally known expert in the absorption, distribution, metabolism, and excretion of ethanol as evidenced by my extensive experience and teaching. My teaching experience includes 9 seminars for judges, beginning in 1999 when I taught a national ABA/NHTSA conference in Newport, RI, followed by seven seminars for judges in Florida (since 1999 and the next scheduled for Dec., 2006), and my teaching of judges in Kentucky in April 2005. I have also published on the blood levels of ethanol, scientifically valid methods of back-extrapolation, and provided the Ethanol Toxicology portion of the syllabus for the 1996, 1998 and 2006 MCLE seminars on dram shop and

civil liquor liability where I taught seminars on dram shop and civil liquor. I have also taught about the breathalyzer at a seminar at Suffolk Law School Feb.6, 2004 and spoken on ethanol at the American Academy of Forensic Sciences (see resume) and the NH Bar Association. At this year's meeting of the Society of Forensic Toxicologists (SOFT), I presented a paper in the SOFT/AAFS Drugs and Driving Committee special session (of which I am also a member) and the title of that presentation was, "The Importance of Developing a Chronology in Determining the Proximate Cause of Impairment in Mixed DUI/DUID Cases." This peer reviewed presentation speaks not only to my qualifications, but also demonstrates peer review and general acceptance of this method, which is the same method I have used to analyze this case (see methods section below). My publications and presentations on ethanol pharmacology and toxicology are all listed on my CV.

I conclude with reasonable scientific certainty that on the evening of September 26, 2003, Mr. Jeffrey Southworth consumed the equivalent of at least 13 "12 oz. beers" in 90 minutes, or more than 4 "12 oz. beers" per 30-minute interval. I further conclude with reasonable scientific certainty that as Mr. Southworth continued to drink, his BAC increased continuously and he became loud and had difficulty carrying himself the way he normally did. His changes in manner were apparent to his friends, one of whom described him as visibly intoxicated while still at the Longhorn Steakhouse. Moreover, before finishing dinner, other patrons in the Longhorn Steakhouse came over to Mr. Southworth's table and asked him and his friends to be more quiet. The amount of ethanol consumed over a relatively short 90-minute period of time, the changes in Mr.

Southworth's manner, and the fact that Mr. Southworth and his friends were so loud that other patrons had to ask them all to be more quiet indicate signs of intoxication from ethanol and permit me to conclude with reasonable scientific certainty that Mr. Southworth was visibly intoxicated when served his last drink at the Longhorn Steakhouse.

Documents Reviewed

In connection with services rendered to counsel for the plaintiff in the above action, counsel for the plaintiff has provided me the documents listed below, which I have read and relied upon:

The complaint filed in Middlesex Superior Court #03-4704L2 in February 2004;
Statement of facts in Support of Summary Judgment filed in the a case of Nancy Rosario, et al v. Jeffrey Southworth, et al, Middlesex Superior Court C.A. #03-4704L2.
Affidavit of Albert L. Farrah, Jr. dated December 20, 2004 filed in the pending action
With, among others, the following attached exhibits: the August 19, 2004 deposition of Jude Connelly; deposition of Thomas Scott Espey; the Massachusetts State Police Collision Reconstruction Report dated September 27, 2003; the November 2, 2003 statement of Leigh Chabot. Deposition of Michael J. Espey, dated June 22, 2004; A copy of the September 26, 2003 bill for the group believed to include Jeffrey Southworth and RARE Hospitality International, Inc., d/b/a Longhorn Steakhouse audit report of that date, reflecting food and beverages believed served to the Southworth group.

I have also reviewed the follow up depositions of: Jude Connolly taken February 10,

2006, Michael Espey taken April 25, 2006 and Thomas Scott Espey taken April 25, 2006, and viewed photographs of Jeffrey Southworth taken the day of his arrest, September 27, 2003.

Methods

Based on the first set of depositions taken in 2004, and the statements of the fact witnesses obtained in 2004, I determined the approximate times of arrival at and departure from each establishment. Also, using the bill containing all the food and drinks ordered while in the Longhorn Steakhouse, I developed a chronology of the amount of food eaten and the number of alcoholic beverages consumed and the times that each was consumed. Using the generally accepted Widmark Formula, I calculated Mr. Jeffrey Southworth's blood alcohol concentration (BAC) over the time interval from 7:30 pm till the accident at 00:10 according to the section describing the Widmark Method.

Unfortunately, the follow up depositions of Jude Connolly taken February 10, 2006, Michael Espey taken April 25, 2006 and Thomas Scott Espey taken April 25, 2006 were not of any help to me because so much time had elapsed since the events in question, that none of the deponents could clearly recall what transpired on the night in question. Most of the testimony in those depositions was speculative and scanty, and could not help me develop a better indication of the facts on the night in question, or a more accurate chronology.

In the 2006 edition of the Massachusetts CLE syllabus for Liquor Liability Update, I told attorneys, "In my experience, there is only one method to use when evaluating a potential Dram Shop case, regardless of whether you are representing the plaintiff or the defendant. That method involves developing a chronology of the eating and drinking that occurred within the time frame of the day/evening in question." (page 97). I have also stressed this method in the two prior seminars I gave on civil liquor liability at MCLE in 1996 and 1998, as well as in the Judicial seminars I have given and the presentations I have given to forensic experts at the American Academy of Forensic Sciences (see CV).

The Widmark Method

Using Mr. Southworth's height as 6'4" and weight of 210 lbs. I have calculated Mr. Southworth's blood alcohol concentration (BAC) using a computerized version of the generally accepted Widmark Formula, which has been widely published in the peer reviewed forensic toxicology literature since the 1940s. Moreover, I have personally published a peer reviewed article using this computerized version of the Widmark Formula in the Medical Review Officer's "MRO Update" in February 1999 which was accepted for publication, and which the editor included the reference to the computer program in the citations. This is the publication of the American College of Occupational and Environmental Medicine (ACOEM) designed for members who work as Medical Review Officers (MROs).

Chronology:

7:30 pm one 12 oz beer

8:10 pm -- one 25 oz Bud Light

8:20 pm – one 25 oz Bud Light

8:50 pm - one 25 oz. Bud Light (check 20043)

9:00 pm - one Jack Daniels Manhattan - Food ordered

9:20 pm - 25 oz Bud Light (check 20043); Food served

9:25 pm Jack Daniels Manhattan (check 20043)

9:35 pm Jack Daniels Manhattan (check 20043)

9:31-9:57 pm print check 20043 six times.

9:57 pm close check 20043 for 202.79

10:30 pm – one 12 oz beer

Budweiser Light contains 4.2% ethanol (v/v). The 12 oz can contained 4.2% x 12 oz or 0.50 oz of ethanol, a 25 oz beer contained 4.2% x 25 or 1.05 oz of ethanol. Based on the three-page document entitled the “Longhorn Bar Recipes”, I determined that each Jack Daniels Manhattan contained: 2.0 oz of Jack Daniels (80 proof, 40%) ($2.0 \times 0.4 = 0.8$ oz plus 0.25 oz of Sweet Vermouth (32 proof, 16%) ($0.25 \times 0.16 = 0.04$ oz), or 0.84 oz of ethanol. However, there seems to be a discrepancy between this recipe and the actual size of the drink when served, since the Jack Daniels Manhattan was served in a 6 oz glass and the above recipe only accounts for 2.25 oz, which means that the above calculations may significantly underestimate the ethanol content of the Jack Daniels Manhattan by 2-3 fold. Accordingly, my Widmark calculations may significantly underestimate Mr. Southworth’s BAC at the time he was served his last drink at 9:35 pm.

BACs Achieved While Drinking

Because of Mr. Southworth's size, Widmark calculations indicated that one 25 oz Bud Light beer, consumed on an empty stomach would produce a peak blood ethanol concentration of approximately 0.02% approximately 60 minutes after beginning to drink the beer. Widmark calculations also indicated that one Jack Daniels Manhattan, consumed on an empty stomach would produce a peak blood ethanol concentration of approximately 0.014% approximately 60 minutes after beginning to drink the Jack Daniels Manhattan. In order to account for the effect of the food that was consumed, after 9:20 pm, the time for peak absorption was changed from 30 to 60 minutes, due to the fact that food retards the rate and extent of absorption of ethanol, and increases the time to reach a peak blood concentration and decreases the peak BAC.

Based on my Widmark calculations, I calculated that when Mr. Southworth arrived at the Longhorn Steakhouse at approximately 8 pm, his BAC would have been approximately 0.01%, based on the beer he had consumed after bike riding. Before being seated at the table, Mr. Southworth consumed two 25 oz beers between approximately 8:10 pm and 8:40 pm. As soon as he was seated, Mr. Southworth ordered another 25 oz beer which was served at approximately 8:50 pm, at which time Mr. Southworth's BAC had increased to 0.07%. At approximately 9:00 pm Mr. Southworth consumed his first Jack Daniels Manhattan and his BAC was approximately 0.08%. This was followed by a 25 oz. beer at 9:20 pm and two additional Jack Daniels Manhattans at 9:25 pm and 9:35 pm, when his BAC would have been approximately 0.13% and 0.15% respectively. Thus during the 15-minute interval between 9:20 pm and 9:35 pm, Mr. Southworth consumed the equivalent of 5 "regular" or 12 oz beers and his BAC rose 0.02% from approximately

0.13% to 0.15% in 15 minutes, an amount of ethanol that would require up to an hour to burn off or metabolize.

From the time Mr. Southworth arrived at the Longhorn Steakhouse around 8-8:05 pm, his BAC would have risen rapidly and steadily from 0.01% until it reached a peak of approximately 0.15% at 9:35 pm, a rate of approximately 0.0015% per minute, or more than one 12 oz beer per 10-minute interval. Stated still another way, the total amount of pure ethanol consumed during the 90-minute interval between 8:05 and 9:35 pm totaled 6.52 oz. Since the amount of ethanol in a "regular" 12 oz beer is 0.5 oz, in 90 minutes, Mr. Southworth consumed the equivalent of $6.52/0.5 = 13$ beers in 90 minutes, or more than 4 beers per 30-minute interval.

Referring to *Douillard v. LMR* (433 Mass. 162, 740 N.E.2d 618), the Court cites *Vickowski v. Polish Am. Citizens Club of Deerfield, Inc.* (422 Mass. 606, 609, 664 N.E. 2d (1996) in pertinent part stating, "[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the person is intoxicated." Certainly signs of visible intoxication would constitute "knowledge" of a patron's intoxication, but so would the number of drinks consumed per hour. Many heavy drinkers are capable of "masking" some signs of intoxication and have developed tolerance and "coping skills" which allow them to compensate for their intoxication while standing or speaking. However, their judgment, coordination, vision, and reaction time behind the wheel of a car are still severely impaired. Such subtle cognitive signs of intoxication may not be directly observed by

another patron of a tavern or a bartender, but the number of drinks served per hour can easily be tracked, observed, counted and equated to a too rapid ingestion of ethanol likely to produce intoxication.

Although BAC is frequently calculated and reported by forensic toxicologists in civil liquor liability cases like the present case, a better indication of impairment is the rate of consumption of ethanol and the associated rate of rise of the BAC. Regardless of tolerance or body weight, when ethanol is consumed too rapidly, it produces a greater degree of intoxication than one would predict from BAC alone. In this case, the Longhorn Steakhouse served alcoholic drinks at such a fast rate and those drinks were consumed by Mr. Southworth and his friends over such a short time interval that Mr. Southworth and his friends were destined to become intoxicated as the ethanol was absorbed both while they were in the tavern and after they left. Indeed, fact witnesses noticed changes in Mr. Southworth's ability to carry himself, and his entire table was told to quiet down at one point during the evening.

Moreover, as stated above, during the 15-minute interval between 9:20 pm and 9:35 pm, Mr. Southworth consumed the equivalent of 5 "regular" or 12 oz beers and his BAC rose 0.02% from approximately 0.13% to 0.15% in 15 minutes an amount of ethanol that would require up to an hour to burn off or metabolize. These drinks continued to be absorbed with time and then plateaued at approximately 0.22% an hour later at 10:30 pm, when Mr. Southworth then had another 12 oz beer. At this point in time, Mr. Southworth's BAC had plateaued at a level of 0.22%, because he still had so much

ethanol in his blood, that he was unable to burn it off. The plateau lasted until almost midnight, when his BAC dropped only 0.01% to 0.21% by midnight and remained at that level up until the time of the accident at 00:10am.

The Longhorn Steakhouse served drinks to Mr. Southworth at the approximate following times: 8:10 and 8:20 (at the bar) and 8:50, 9:00, 9:20, 9:25 and 9:35 pm. Since the body can only "burn off" or metabolize the amount of ethanol in one regular 12 oz beer each hour, consumption of more than 0.5 oz of ethanol per hour will lead to accumulation of ethanol in the blood. Serving high alcohol content beverages to patrons at this rate of service should most definitely alert the employees of Longhorn Steakhouse to the fact that Mr. Southworth was accumulating ethanol in his blood faster than he could burn it off. Therefore, employees of the Longhorn Steakhouse should have known that Mr. Southworth would become increasingly intoxicated as the ethanol was absorbed over the course of the evening. In fact, with a large amount of ethanol in his stomach and GI tract, Mr. Southworth became a walking time bomb, ready to become a drunk driver as he absorbed the ethanol that was served to him, and sequestered in his stomach and small intestines. The fact that Mr. Southworth was already loud and carrying himself differently when served his last drink at the Longhorn Steakhouse was evidence that he was intoxicated while at the Longhorn Steakhouse, and a harbinger of the tragedy that predictably and foreseeably would occur a few hours later, as the ethanol was absorbed from Mr. Southworth's GI tract and raised his BAC to over 0.20%.

Consider the following analogy regarding absorption and excretion of ethanol. If you run the water in your bath tub at 10 gallons per minute, but the drain can only accommodate 5 gallons per minute, you are going to accumulate 5 gallons per minute in the tub. Even if you slow down the filling rate (rate of ingestion) to 7 gallons per minute, the water level will continue to rise. Even if you stop the water, it will still take time for the water level to decrease because the drainage rate (excretion rate) is fixed at 5 gallons per minute and will not change.

The rate of onset of the effects of ethanol are related to the amount of ethanol consumed and the rate of consumption. Consider a typical 12 oz beer such as the one Mr. Southworth drank around 7:30 pm. It contains 0.5 oz of ethanol. The 25 oz beers contained twice as much ethanol (1.0 oz) and the Jack Daniels Manhattans contained almost 1.7 times as much ethanol (0.84 oz) as a 12 oz beer. Mr. Southworth drank a large amount of ethanol in the short period of time of approximately 1 ½ hours (8-9:25 pm). Since the body can only burn off or excrete ethanol at a fixed rate of approximately one 12 oz beer per hour, amounts of ethanol in excess of that accumulate in the blood. When Mr. Southworth continued to consume high ethanol content beverages at a rate in great excess over that which his body could burn off or excrete, Mr. Southworth's BAC continued to increase because his rate of consumption of ethanol exceeded the capacity of his body to excrete ethanol.

Public Policy and Public Health Issues

Referring once again to *Douillard v. LMR* (433 Mass. 162, 740 N.E.2d 618), the Court cites *Vickowski v. Polish Am. Citizens Club of Deerfield, Inc.* (422 Mass. 606, 609, 664 N.E. 2d (1996) in pertinent part stating, “[A] tavern keeper does not owe a duty to refuse to serve liquor to an intoxicated patron unless the tavern keeper knows or reasonably should have known that the person is intoxicated.” Tavern owners are sophisticated in their knowledge of ethanol absorption, distribution, metabolism and excretion. An establishment serving drinks that contain 1 ½ to 2 times the amount of ethanol as a typical beer (0.5 oz), a 4 oz glass of 12% wine (0.48 oz) or a 1 ¼ oz shot of 80 proof spirits (0.5 oz), must know that drinkers of such drinks are going to become intoxicated at a faster rate than if they were drinking smaller portions of ethanol. Accordingly, such establishments must reduce the rate at which they serve their customers accordingly, in order to avoid getting those patrons who drink too quickly intoxicated. Moreover, after consuming a large amount of ethanol with food, sophisticated tavern owners must know that the time required to absorb all the ingested ethanol will be extended to at least an hour. This sets up a situation where an individual may have consumed enough ethanol while in the establishment to become intoxicated 30-60 minutes later, as the ethanol is absorbed into the blood stream from the GI tract. This is a foreseeable and inevitable set of circumstances that will be fulfilled. Part of the requirement of the law that a tavern keeper not overserve a patron is due to the tavern owners duty to unknown third parties who share the public highways with patrons who drink in their establishment. Public policy issues and public health standards require that patrons in a tavern not be served so much ethanol that they become intoxicated and in so doing become a hazard on the highways.

Standards in the Forensic Toxicology Community Regarding Signs of Visible Intoxication

Based on a study published by the American Medical Association in Alcohol and the Impaired Driver (1968), 62% of non-tolerant individuals with a BAC between 0.10-0.15% will show signs of visible intoxication at that range of BACs, while at BACs between 0.15-0.20%, 89% of non-tolerant individuals will show signs of visible intoxication at that range. Because the 0.15% is so critical that signs of visible intoxication increase from approximately 6/10 to 9/10 at 0.15% (a 150% increase), the forensic toxicology community indicates that in general, 0.15% is the BAC generally considered representative of showing signs of visible intoxication. However, Mr. Southworth was not "non-tolerant", he was a frequent alcohol consumer and would have been likely to demonstrate some tolerance to the intoxicating effects of ethanol. Even so, he was described as showing signs of visible intoxication in the form of not carrying himself as he usually did, being more loud than usual, to the extent that people came over to his table and asked the group to be more quiet.

According to a study by Perper et al entitled "Tolerance at High Blood Alcohol Concentrations: A Study of 110 Cases and Review of the Literature", (see Journal of Forensic Sciences 1986; 31:212-221), of 110 alcoholics studied in a detoxification unit, out of 54 subjects with a BAC of 0.20% or higher, only 13 (24%) showed no sign of clinical intoxication. Speech was abnormal in 43%, gait was abnormal in 59%, vision was impaired in 56% and verbal comprehension was impaired in 24% and coordination was impaired in 65%. Also, by the time BACs reached 0.30%, none of the subjects

exhibited sobriety in all tested parameters. However, most of these participants would have been in the post-absorptive phase of ethanol disposition and their BACs would have been declining, unlike Mr. Southworth's BAC which was rising rapidly. Since people will be more impaired by ethanol when the BAC is rising than when it is falling (Mellanby Effect), the statistics on the percent of individuals who showed signs of impairment cited above would be lower than the what one would expect to find in a person who was drinking ethanol on a rapid basis and whose BAC was rising, rather than falling. This would have been the case with Mr. Southworth.

Moreover, during the 15-minute interval between 9:20 pm and 9:35 pm, Mr. Southworth consumed the equivalent of 5 "regular" or 12 oz beers and his BAC rose 0.02% from approximately 0.13% to 0.15% in 15 minutes an amount of ethanol that would require up to an hour to burn off or metabolize. Serving the equivalent of 5 beers to a patron within the last 15 minutes they are in your establishment and knowing that they would go out and drive on a public way and put other citizens and themselves at an increased risk of a motor vehicle accident is certainly knowable, and constitutes irresponsible conduct which is not consistent with the language of Douillard.

Moreover, if you look at the times reflected on my Widmark graph, one can easily see that drinks were served to Mr. Southworth at the Longhorn Steakhouse at the approximate following times: 8:10, 8:20, 8:50, 9:00, 9:20 9:25 and 9:35 pm. Since the body can only "burn off" or metabolize the amount of ethanol in one regular 12 oz beer

each hour, consumption of more than 0.5 oz of ethanol per hour will lead to accumulation of ethanol in the blood.

Conclusions

I conclude with reasonable scientific certainty that Mr. Jeffrey Southworth was already visibly intoxicated when he was served his last drink at the Longhorn Steakhouse on the evening of September 26, 2003. As he continued to drink, his BAC increased continuously and he became loud and had difficulty carrying himself the way he normally did. His BAC continued to rise up until 10:20 pm when it peaked at 0.22%, and had only dropped 0.01% to 0.21% at the time of the tragic motor vehicle accident at approximately 00:10 am. The one 12 oz beer Mr. Southworth consumed at 10:30 pm would only have contributed less than 0.01% to his BAC, due to his size and the food remaining in his stomach.

Fees

To date I have received \$6600 for my time.

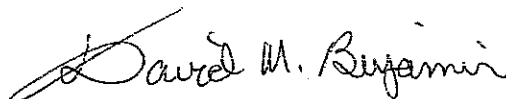
Prior Testimonies

Prior Testimonies are attached.

Publications

My CV has already been submitted.

Very truly yours,



David M. Benjamin, Ph.D.

Clinical Pharmacologist and Toxicologist

EZ-ALC Ver 2.0 - DataScreen

Subject Name :Mr. Jeffrey Southworth : I.D.# :XX22X:
 Body Weight :210: Pounds. Initial BAC :.0000:
 Widmark Beta :.020: % per hour.
 Widmark r :.64:

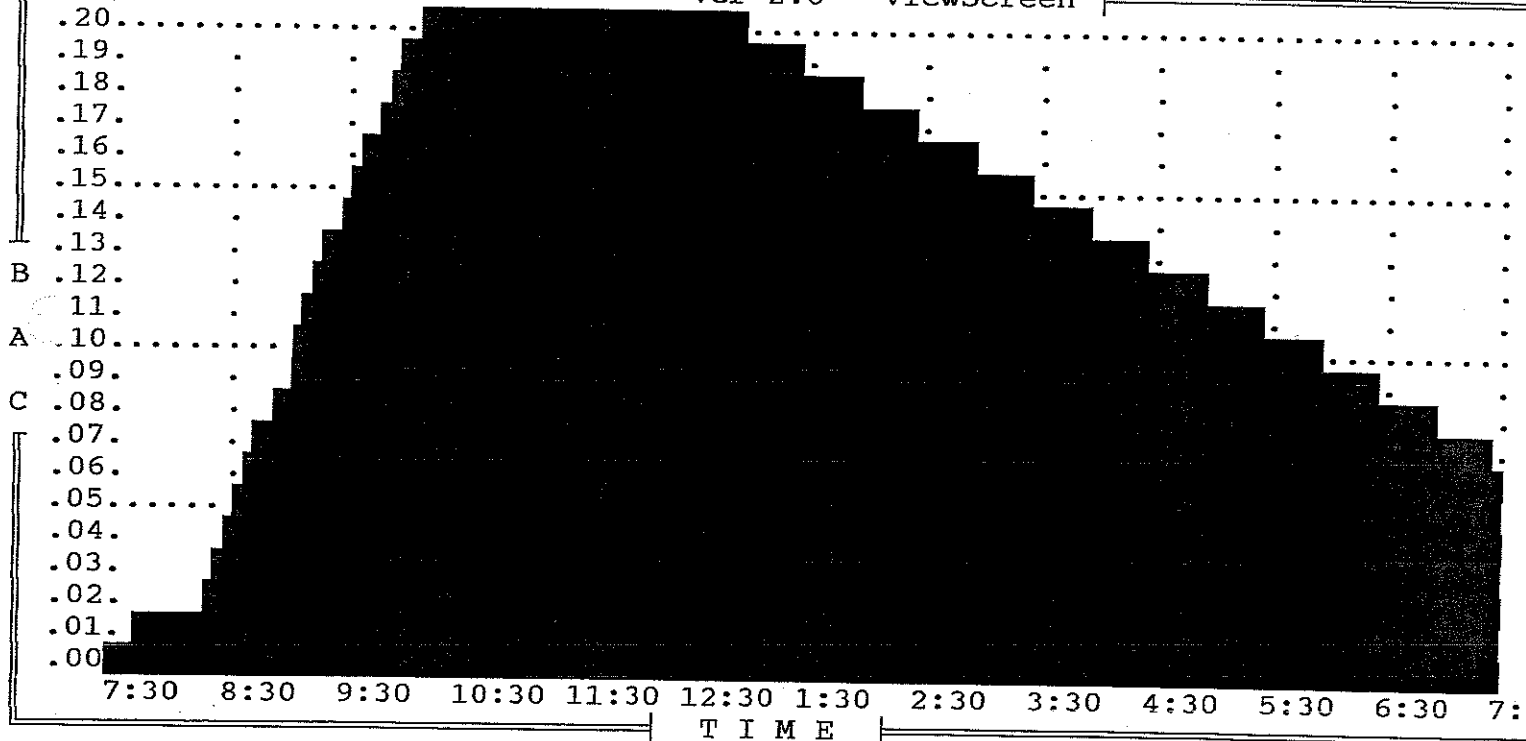
Drink Number	FLOz EtOH	Start Time	Absorb Time
1	0.50	7:30	030
2	1.00	8:10	030
3	1.00	8:20	030
4	1.00	8:50	030
5	0.84	9:00	030
6	1.00	9:20	060
7	0.84	9:25	060
8	0.84	9:35	060
9	0.50	10:30	060
10	0.00	0:00	060
11	0.00	0:00	060
12	0.00	0:00	060

Drink Number	FLOz EtOH	Start Time	Absorb Time
13	0.00	0:00	060
14	0.00	0:00	060
15	0.00	0:00	060
16	0.00	0:00	060
17	0.00	0:00	060
18	0.00	0:00	060
19	0.00	0:00	060
20	0.00	0:00	060
21	0.00	0:00	060
22	0.00	0:00	060
23	0.00	0:00	060
24	0.00	0:00	060

Main Menu

? Help DATA: Del File Edit List + - BAC: View Screen Print TBA QUIT

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				EZ-ALC Ver 2.0 - ScreenPrint																									
Absorb				0	0	0	0	0	0	0	0	0	0	1	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2
EtOH Time				0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5
(FloZ)(Min) BAC Time				0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5
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		.1166	9:15	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*														
1.00	60	.1273	9:20	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*														
0.84	60	.1346	9:25	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.1448	9:30	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
0.84	60	.1493	9:35	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.1567	9:40	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
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		.2008	10:10	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
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Absorb				0	0	0	0	0	0	0	0	0	0	1	1	1	1	1	1	1	1	1	1	2	2	2	2	2	2
EtOH Time				0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5
(FloZ)(Min) BAC Time				0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5	6	7	8	9	0	1	2	3	4	5
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		.2236	11:30	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.2220	11:35	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.2203	11:40	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
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		.2170	11:50	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.2153	11:55	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
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		.2120	12:05	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													
		.2103	12:10	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	---	*													

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From Alcohol and the Impaired Driver

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CHAPTER II

ACUTE ALCOHOLIC INTOXICATION

NOTE: Measurements of blood-alcohol levels throughout this book are stated in terms of percentage, weight by volume, based upon the number of milligrams of alcohol per 100 milliliters of blood. For discussion and explanation see page XIII. Scientific and technical reports and publications referred to in the text are listed alphabetically, following Chapter X.

CHARACTERISTICS OF ACUTE INTOXICATION

TABLE 3: RELATION BETWEEN BLOOD-ALCOHOL LEVEL AND DRUNKENNESS

Percent of Persons Diagnosed as Drunk									Total Persons Examined	Investigator
0.00 to 0.05	0.051 to 0.10	0.101 to 0.15	0.151 to 0.20	0.201 to 0.25	0.251 to 0.30	0.301 to 0.35	0.351 to 0.40	0.401		
0	19	50	83	93	98	100	100		1942	Widmark
2	38	93	97	99	100	100			950	Schwarz
10	18	47	83	90	95	96	93	100	1000	Jetter
10	68	81	92	97	100				1712	Andres
0	46	50	92	100	100	100	100	100	140	Harger
0	14	69	90	94	94	100	100	100	100	Prag
7	25	49	85	93	97	98	100	99	750	Hine
4	32	62	89	95	98	99	99	100	6594	Mean above 7

Percent weight by volume (0.05 percent w/v=50 mg/100 ml, 0.15 percent w/v=150 mg/100 ml) of Blood Alcohol

Commonwealth vs. English; Salem Superior Court, 10/12/06; For Defendant – Widmark calculations of blood ethanol; impairing effects of toxic organic chemicals.

Commonwealth vs. Roster; Wrentham District Court, 7/18/06; For Defendant
Interpretation of urine and drug test results

Commonwealth vs. White; Norfolk Superior Court, 7/7/06; For Defendant – cocaine;
Urine drug screens

Commonwealth vs. Jenkins; Suffolk Superior Court, 7/7/06; For Defendant;
analysis of cocaine;

Commonwealth vs. Decarlo; Cambridge District Court, 1/11/06; For Defendant
Effects of illicit drugs

Commonwealth vs. Doyle; Middlesex Superior Court, 2/1/06; For Defendant
Effects of illicit drugs

Commonwealth vs. Perella; Middlesex Superior Court, 1/5/06; For Defendant
Effects of oral anti-diabetic medication

Doucette vs. Abramofsky; Suffolk Superior Court, 11/05; For Plaintiff
Dram Shop -Widmark calculations of blood ethanol

Rowley vs. Tripathi; Deposition – Maryland Superior Court, 10/10/05; For Defendant
Medical Negligence involving prescription drugs

Commonwealth vs. Maurice Evans; Dedham District Court, 9/23/05; For Defendant
Widmark calculations of blood ethanol

Commonwealth vs. Annes; Hingham District Court, 6/28/05; For Defendant - OUI

Commonwealth vs. Jerome Jones; Middlesex Superior Court, 9/16/05; For Defendant
Effects of MDMA and amphetamines

United States vs. Michelle Evans; U.S. District Court, Boston, MA, 9/13/05;
For Defendant – Interpretation of serial urine screens for THC

Callais vs. Main Street Brewery, Deposition 10/28/05; For Plaintiff
Dram Shop -Widmark calculations of blood ethanol

Commonwealth vs. Mitrano; Cambridge District Ct., 8/12/05; For Defendant

Reynolds vs. GBR Electric, Inc. and Northern Adjusters, Inc.; Alaska Workers' Compensation Board; Deposition by Phone 2/05; Phone Testimony for Workers'

Compensation Board 4/7/05; For Claimant. Interpretation of blood ethanol and methanol levels.

Chartier vs. Dow; Deposition - 2004, Polk County, FL; For Plaintiff
toxicity of organophosphates

Commonwealth vs. Gava; Concord District Court, 2004; For Defendant -OUI

Fullerson vs. Berry; California Superior Court; Deposition 10/14/03; Trial 4/04; For Plaintiff - Combined toxicities of lidocaine and bupivacaine

In the matter of Patricia A. McGeady, deceased; Superior Court of New Jersey, Trial 2004; For Plaintiff Effects of prescription drugs on cognitive abilities.

Commonwealth vs. Robertson; Quincy District Court, 2004; For Defendant

United States vs. Brown; U.S. District Court MA Springfield, 8/04; For Defendant
Differences among "crack", free base, and cocaine hydrochloride.

Peggy Cooper Cafritz vs. Sibley Memorial Hospital, et al; Superior Court of the District of Columbia; Deposition 2003; For Defendant toxicity of glucocorticoids

Commonwealth vs. Petrin; Trial Court of Massachusetts, District Court Department, 2003; For Defendant

Joseph Albert vs. Gus and Paul's Tavern; Lowell Superior Court; 3/31/03; For Defendant
Dram Shop -Widmark calculations of blood ethanol

McGrail, et al vs. Harley-Sanford Post 4368, VFW of the U.S.; Trial 2002/2003; For Defendant Dram Shop -Widmark calculations of blood ethanol

Hannah Christopher vs. Barkin Scrap Iron, et al; Michigan, Deposition 2002; For Defendant Effects of heroin withdrawal

In the matter of the Estate of Madeleine L. Stockdale, deceased; Superior Court of New Jersey, Chancery Division; Trial 2002; For Plaintiff Effects of prescription drugs on cognitive abilities.

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Brief Biography

Academic

Boston University, B.A. in Biological Sciences, 1968

University of Vermont College of Medicine, M.S. & Ph.D. in Pharmacology, 1968-72

Kansas Univ. Medical Center, Fellowship, Clinical Pharmacology/Toxicology, 1972-3

Work Experience in the Pharmaceutical Industry

Twelve years of experience in the Pharmaceutical Industry: Conducting Clinical Drug Studies, Evaluating Adverse Drug Reactions, Writing Labeling, and Filing INDs and NDAs with the FDA.

Publications

Dr. Benjamin has more than 180 Presentations and Publications listed on his full CV, including a book chapter entitled "*Forensic Pharmacology*" in *Forensic Science Handbook Volume III*. This textbook was reviewed by the Journal of Forensic Sciences and described as follows: "This third volume follows what has become a tradition of in depth chapters written by recognized forensic experts Forensic science practitioners and attorneys who interact with them, in either the criminal or civil areas, will find this collection of learned treatises a required addition to their professional library."

Teaching Experience

Adjunct Assistant Professor - Tufts University School of Medicine, 2001; Harvard Medical School Risk Management Program, Boston, MA, Dec.1999 - 2003; Breathalyzer and Blood Alcohol, Field Sobriety Testing, Urine Drug Screening and Drug Recognition Testing, ABA/NHTSA Seminar for Judges, 4/30/99; Traffic Adjudication Seminar for Florida Judges, Dec. 1999 - 2003; Understanding Blood Alcohol Levels - Mass. Academy of Trial Attorneys - Operating Under the Influence Seminar Oct. 1994 - Mass. Continuing Legal Education - 2/13/96, 5/21/96 & 7/27/98; GW University Law School (99-04); The Role of the Occupational Health Specialist in a Toxic Chemical Exposure Case - Harvard School of Public Health - 1999-02; Massachusetts College of Pharmacy & Allied Health Sciences, Adjunct Associate Professor of Regulatory Affairs & Health Policy - 1999 - 2000; Food and Drug Law and Public Policy Issues - Fordham Law School - April 1994-5; Scientific Evidence - Stetson University College of Law - 1990, 1997-03; American Board of Quality Assurance and Utilization Review Physicians - 1998 - 02; American Academy of Forensic Sciences; American College of Legal Medicine; Risk Management for Physicians - Harvard Medical School - Jan. 1995; The Interface of Drug Product Liability and Medical Malpractice - Conference of the American Association of Legal Nurse Consultants - May 1995; Statistics, Science and Using the Medical Literature - ATLA's National College of Advocacy - Paralegal Program - June 1995; Understanding the Analysis of Blood and Urine Samples for Drug Abuse - Mass. Continuing Legal Education - 1994/95; Presenting Scientific Evidence in Court: Meeting the *Daubert* Standards for Reliability, Am. Acad. Forensic Sciences, 2/21/00; Chair, Teaching Forum, American College of Clinical Pharmacology -1999-2004, Chair, Education Committee, 2003-2004.

Professional Organizations

Fellow, American College of Clinical Pharmacology, Board of Regents, 2000-2005; Program Committee, 1999 & 2002-3; Education Committee, & Chair, Teaching Forum, 00-03; Fellow, American College of Legal Medicine; Fellow, American Academy of Forensic Sciences (Toxicology); Member: American Society for Clinical Pharmacology & Therapeutics; Am. Acad. of Clinical Toxicology; American Health Lawyers Association - Member, Dispute Resolution Service for Mediation & Arbitration; American Public Health Association, & Fellow, American Society for Healthcare Risk Management; Editorial Boards: J. Healthcare Risk Management & J. of Clinical Pharmacology.

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CURRICULUM VITAE**EDUCATION**

University of Kansas Medical Center, Departments of Medicine and Pharmacology,
Post-Doctoral Fellowship in Clinical Pharmacology and Toxicology, 1972-1973.

University of Vermont College of Medicine, Department of Pharmacology, M.S., 1970; Ph.D., 1972.

Boston University, Department of Biological Sciences, Biological Sciences with emphasis in Physiology,
B.A., 1968.

CURRENT CONSULTING ACTIVITIES

Clinical Pharmacology, Clinical & Forensic Toxicology; Drug Interactions, Pharmacokinetics; Adverse Drug
Reactions; Drug Safety, Substance Abuse; Federal Regulations governing: Clinical Trials, IND/NDA
Filings; Product Labeling; Informed Consent, Human Rights; QC/QA; GMPs.

EMPLOYMENT HISTORY IN THE PHARMACEUTICAL INDUSTRY (from most recent)

William H. Rorer, Inc./Revlon Health Care (Rorer acquired Revlon in 1985), Ethical Products Division,
USV Laboratories & Armour Pharmaceutical Company, Director, Clinical Research - 1984-1986.

Astra Pharmaceutical Products, Inc.

Director, Clinical Research (Local Anesthetic Products & Pain Control) - 1982-3

Hoffmann-La Roche, Inc.

Director, Corporate Licensing Department - 1980-1982

Clinical Research Scientist (Medical Monitor) - 1974-1980

Pfizer Pharmaceuticals

Assistant Director, Scientific Affairs - 1973-1974

ACADEMIC APPOINTMENTS AND ADVISORY AFFILIATIONS

Tufts University School of Medicine
Dept. Pharmacology & Experimental Therapeutics
Adjunct Assistant Professor, 2001-Present

Massachusetts College of Pharmacy and Allston
Adjunct Associate Professor of Regulatory
Affairs & Health Policy, 1999-2000

Cornell University Medical College,
Dept. of Pharmacology
Clinical Pharmacology Section,
Assistant Adjunct Professor, 1976-1982

Massachusetts General Hospital
Division of Nuclear Medicine
Consultant in Drug Development - 1989-1999

Drug Therapy, Department Editor, 1993-94

University of Bonn School of Medicine
Bonn, Germany, Visiting Professor of Medicine
and Pharmacology, October, 1981.

Journal of Healthcare Risk Management,
Editorial Review Board, 1998-Present

Journal of Clinical Pharmacology
Editorial Board, 2000-Present

Journal of Quality Health Care
Editorial Board, 2001-Present

ACADEMIC APPOINTMENTS AND ADVISORY AFFILIATIONS (cont'd)

Guest Faculty: Harvard School of Public Health - Occupational Health Policy & Administration Course
1995-2003

Stetson University College of Law (1990, 1997-Present), Fordham University School of Law (1994, 1995)

Harvard Medical School Risk Management Program (1999-Present); George Washington University Law
School (99-Present)

PROFESSIONAL SOCIETIES

Society of the Sigma Xi, 1975-Present

American Pharmaceutical Association, Academy of Pharmaceutical Research and Sciences 1974- Present

American Society for Clinical Pharmacology and Therapeutics, since 1970s

member - Medical Education Committee, 1976-83, Program Committee, 1982-83

Constitution and By-Laws Committee, 1984-85

Committee on Substance Abuse, 1987-1999

American College of Clinical Pharmacology Member/Fellow 1972-Present; Board of Regents, 2000-2005;

Chair, Teaching Forum, 1999-Present; Program & Education Committees 1999-00; Program Committee 2002

New York Academy of Sciences, 1976-2001

American Academy of Dermatology, 1978-79; 1983-84

American Federation for Clinical Research, 1970s-1998

Associates of Clinical Pharmacology, 1979-86; (President, 1981-82)

American Pain Society, 1982-84

American Association for the Advancement of Science, 1980-2001

American Society of Regional Anesthesia, 1983-Present

American Society of Anesthesiologists, 1983-Present

American Academy of Clinical Toxicology, since 1970s; member - Acute and Intensive Care Section, 1990-Present

American College of Legal Medicine, 1991; Elected Fellow 1998

American Society of Law, Medicine and Ethics 1991-1996

Drug Information Association, 1987-1998

National Forensic Center, 1986-2001, Member, Advisory Board, 1991-93

Association of Trial Lawyers of America, Non-Attorney Member 1990-Present

Defense Research Institute, Non-Attorney Member 1990-Present

The Hastings Center, 1992-1995

American Health Lawyers Association (formerly NHLA), Non-Attorney Member, 1993-1999

International Society of Occupational Medicine & Toxicology, 1994-Present

American Statistical Association, 1994-1998

Pittsburgh Institute of Legal Medicine, 1994-2001

American Academy of Forensic Sciences, (Forensic Toxicology) 1995-Present; Fellow, 2001

American Society for Healthcare Risk Management, 1996-Present; Fellow, June 2002

American Public Health Association, 1997-2001

DISPUTE RESOLUTION PROGRAMS

NHLA/AAA Training Program in Arbitration - 1993

NHLA Training Program in Mediation - 1997

NHLA Alternative Dispute Resolution Service (Arbitration, 1993 & Mediation, 1997)

Negotiation and Conflict Resolution for Health Care - Harvard School of Public Health, 1997

Center for Medical Ethics and Mediation, San Diego, CA, Instructor, 1997, Board Member, 1998.

ACADEMIC HONORS

Awarded Second Prize in Independent Research Competition, Vermont Chapter of the Sigma Xi, 1970.

Participant: ASPET's Third Supplementary Training Program in Molecular

Pharmacology- University of California Medical Center, SF, CA - July, 1971

Completed Massachusetts Institute of Technology's summer program in: Enzymes in

Analysis and Diagnosis - Certificate of Completion - June, 1975

American Men and Women of Science, 14th Edition, 1979. Who's Who in the East, 23rd Edition, 1990.

Conversational French, German and Italian.

RESEARCH INTERESTS

Clinical Trial Methodology, Pharmacokinetics, Drug Interactions, Adverse Drug Reactions, Clinical Toxicology, Substance Abuse, Correlations Between Drug Blood Levels and Pharmacologic and Toxicologic Effects.

BREATHALYZER TESTING: Breath Alcohol Testing for Forensic Purposes; Principles, Practice and Present Status, Completed: August 24, 1999, at UCLA, as part of the International Association of Forensic Sciences, LA, CA.

DISSERTATIONS

Ph.D. Thesis: A Study of Approaches to the Chemical Analysis of Aminoglycoside Antibiotics, September, 1972.

Master's Thesis: Studies of the Molecular Interaction Between Warfarin and Cholestyramine, May, 1970.

Benjamin, David M., Robinson, Donald, S. and McCormack, John J.:
Cholestyramine Binding of Warfarin in Man and In Vitro. Clinical Research 18:336, 1970.

Benjamin, David M., McCormack, John J. and Gump, Deiter W.: Studies of Approaches
to the Chemical Determination of Kanamycin in Body Fluids. (Presented at the Eleventh Interscience
Conference on Antimicrobial Agents and Chemotherapy, Atlantic City, NJ, October, 1971).

Shoeman, Donald W., Benjamin, David M. and Azarnoff, Daniel L.:
Alteration of Human Serum Albumin in Uremia. (Presented: the New York Academy of Sciences'
Conference on Drug Protein Binding, New York, New York, January, 1973).

Maxwell, D.R., Benjamin, D.M., Donahay, S., et al: Randomized Double-Blind Study of
1, 25-dihydroxy-vitamin D-3. (Presented in part at the Clinical Dialysis and Transplant Forum of the Council
of Dialysis and Transplantation, National Kidney Foundation, Washington, DC, November, 1977).

Benjamin, David M., Symposium Chairperson: Clinical Pharmacology/Toxicology of Drug Abuse.
(Presented at the Seventh Annual Meeting of the American College of Clinical Pharmacology,
San Francisco, CA, April, 1978).

Benjamin, David M.: Patterns of Drug Abuse. (Presented at the Seventh Annual Meeting of the American
College of Clinical Pharmacology, San Francisco, CA, April, 1978).

Benjamin, David M.: Problems of Polypharmacy. (Presented in part at "Use of Psychopharmacologic and
Analgesic Agents in the Clinical and Psychosocial Care of the Dying Patient and the Bereaved",
Columbia-Presbyterian Medical Center, New York, New York, May, 1978).

Benjamin, David M., Carbone, John J. and Coutinho, Claude B.: Effects of Phenobarbital and SKF-525A
on the Metabolism and Hypnotic Effect of Flunitrazepam in Mice. (Presented at the Annual Meeting of the
Academy of Pharmaceutical Sciences, Hollywood, FL, November, 1978).

Diagnosis and Treatment of Drug Abuse, Invited Discussant, Rutgers Medical School,
Newark, NJ, May, 1978.

Benjamin, David M., Berl, T., Maxwell, D. et al: Effects of Calcitriol on the Biochemical Abnormalities
Associated With Chronic Dialysis: A Multi-Center Double-Blind Controlled Study.
(Presented at the Annual Meeting of the American Society of Clinical Pharmacology and Therapeutics,
Kansas City, MO, March, 1979).

Benjamin, David M. - Co-Chairperson - Experimental Protocol Design, (Presented at the Annual Meeting of
the Associates of Clinical Pharmacology, Kansas City, MO, March, 1979).

Benjamin, David M.: Analgesia, Pain and Analgesic Drug Interactions.
(Presented at the American Cancer Society Symposium: Pain Control for the Cancer Patient: A
Multidisciplinary Approach, Nutley, NJ, April 23, 1980).

New Developments in Local Anesthetic Agents and Pain Control, Invited Presenter, Workshop on Regional
Anesthesia, Sponsored by the American Society of Regional Anesthesia,
Cambridge, MA, October, 1982.

Yagiela, J.A. and Benjamin, D.M.: Evaluation of Etidocaine For Topical Anesthesia.
J. Dental Research, September, 1983.

Greenblatt, D.J., Benjamin, D.M., Willis, C.R., et al: Two-Percent Lidocaine Solution: Systemic Plasma Levels Following Topical Oral Cavity Use, Or When Swallowed. (Presented at the Annual Meeting of the American College of Clinical Pharmacology, October, 1984).

Benjamin, D.M., Gordon, G., Baran, D. et al: Intranasal Calcitonin Lowers Alkaline Phosphatase In Page Patients. (Presented at the International Conference on Calcium and Bone Metabolism, Nice, France, October, 1986).

Benjamin, David M., et al: Open-Label Study of Intal (cromolyn sodium) in Patients With Eosinophilia Myalgia Syndrome Due to L-tryptophan. Preliminary report: L-T/EMS Update, November, 1990, and J. Pharmacy Practice 4:(2) VI-X, 1991.

Benjamin, David M.: When Is A Drug Not A Drug? The L-Tryptophan Tragedy: Lessons To Be Learned. (Presented at the Annual Meeting of the Drug Information Agency, Washington, DC, June 18, 1991).

Robinson, Donald S., Benjamin, David M. and McCormack, John J.: Interaction of Warfarin and Nonsystemic Gastrointestinal Drugs, Clin. Pharmacol. Therap. 12:491-495.1971.

Benjamin, David, McCormack, John and Gump, Deiter: The Use of Newer Amino Group Reagents For T Detection And Determination of Kanamycin, Anal. Chem. 45:1531-1534, 1973.

Shoeman, Donald W., Benjamin, David M. and Azarnoff, Daniel L.: The Alteration of Plasma Protein in Uremia as Reflected in The Ability to Bind Diphenylhydantoin, Ann. N.Y. Acad. Sci. 226:127-130, 1973.

Maxwell, D.R., Benjamin, D.M., Donahay, S.L.: Effects of Calcitriol in Dialysis Patients, Clin. Pharmacol. Therap. 23:515-519, 1978.

Maxwell, D.R., Benjamin, D.M., Donahay, S.L., et al: Randomized Double-Blind Study of 1,25-dihydroxy-Vitamin D3 in Dialysis Patients, Proc. Clin. Dialy. Transpl. Forum. 7:166-169, 1977.

Benjamin, David M.: Problems of Polypharmacy, Arch. Thanatol. 7:11, 1978.

Fried, M., Stanley, J., Stengel, F., Shupack, J. and Benjamin, D.: Mal De Meleda Treated With 13-cis Retinoic Acid, Arch. Dermatol. 115:605-608, 1979.

Willis, C.R., Greenblatt, D.J., Benjamin, D.M., et al: Simultaneous Determination of Lidocaine and Its Deethylated Metabolites Using GLC with Nitrogen-Phosphorous Detection, J. Chromatography, 307:200-205, 1984.

Greenblatt, D.J., Benjamin, D.M. et al: Lidocaine Plasma Concentrations Following Administration of Intraoral Lidocaine Solution, Arch. Otolaryngology, 111:298-300, 1985.

Benjamin, David M.: Drug Defects' Dilemmas: Drugs Don't Have Side Effects, People Do!, Expert Witness Journal, Vol. 1, No. 7, pages 1-ff, July, 1989.

Benjamin, David M.: The Legal and Social Ramifications of Urine Drug Testing In The Workplace, Sixth Annual Meeting of the National Forensic Center, San Antonio, TX, December 10, 1989.

Benjamin, David M.: Drug Product Liability Litigation: Federal Law vs. Nature's Law, Presented at the Annual Meeting of the American College of Legal Medicine, Orlando, FL, March 16, 1990.

Hand, Robert P. and Benjamin, David M. (Eds.): What's Behind the L-tryptophan Ban? Medical Sciences

Benjamin, David M.: History and Pathogenesis of L-Tryptophan-Induced Eosinophilia Myalgia Syndrome (EMS) and Approaches to Treatment. Presented: National ATLA meeting, San Diego, CA, July, 1990.

Benjamin, David M.: L-Tryptophan: A Pharmaceutical Detective Story, J. Pharmacy Practice 4:(2) VI-X, 1991.

Benjamin, David M.: When Is A Drug Not A Drug? The L-Tryptophan Tragedy: Lessons To Be Learned, Drug Information Journal 26:(2) 231-236, 1992.

Benjamin, David M.: Risk Management Strategies for Prescribing Drugs, Presented at the Annual Meeting of the American College of Legal Medicine, Las Vegas, Nevada, March 11, 1993.

Benjamin, David M.: Elements of Causation in Toxic Tort Litigation: Science and Law Must Agree, J. Legal Medicine 14:153-165, 1993.

Benjamin, David M.: Prescriber Liability: Minimize Your Risks, Drug Therapy 23: (8) 15-26, 1993.

Benjamin, David M.: Distinguishing Reliable Science From Junk Science in the Post-Daubert Era, J. Mass. Acad. of Trial Attorneys, October, 1993, p.40-44.

Benjamin, David M.: Symposium Coordinator: The Impact of Daubert v. Merrell Dow Pharmaceuticals on the Admissibility of Expert Testimony, 10th Annual Meeting of the National Forensic Center, Las Vegas, Nevada, December 4, 1993.

Benjamin, David M.: The Use and Misuse of the Scientific Method, Statistics, and Epidemiology in the Evaluation of the Toxic Tort Case, 10th Annual Meeting of the National Forensic Center, Las Vegas, Nevada, December 4, 1993.

Benjamin, David M.: New Developments in Drug Therapy - Curses and Cures, Presented at the Annual Meeting of the American College of Legal Medicine, Anaheim, CA, March 11, 1994.

Benjamin, David M.: Communicating With Patients About Adverse Drug Reactions, Drug Therapy 24: (4) 36-38, 1994.

Benjamin, David M.: The Pharmacoepidemiology of Adverse Drug Reactions: The "First Year Effect" or Expansion of The Denominator. (Presented at the Annual Meeting of the Drug Information Association, Washington, DC, June 7, 1994.)

Benjamin, David M.: Recognizing & Preventing Adverse Drug Reactions, Drug Therapy 24: (6) 52-56, 1994.

Benjamin, David M.: Understanding Blood Alcohol Levels. (Presented at the Massachusetts Academy of Trial Attorney's Seminar on "Preparing & Trying Your Drunk Driving Case Under the New OUI Amendments", Boston, MA, October 5, 1994.

Benjamin, David M.: Legal Update: New State and Federal Case Law Implications for Testifying as an Expert (Presented at the Spring Conference of the American Board of Vocational Experts, Marco Island, FL, March, 1995).

Benjamin, David M.: Symposium Chairperson: Opportunities and Challenges in the Evaluation and Management of Chronic Pain (Presented: the Annual Meeting of the American College of Legal Medicine)

Orlando, FL, March, 1995).

Benjamin, David M.: Medical-Legal and Regulatory Implications of Analgesic Therapy (Presented at the Annual Meeting of the American College of Legal Medicine, Orlando, FL, March, 1995).

Benjamin, David M.: Case Studies in Pharmaceutical Risk Management, Medical Sciences Bulletin 17:(12) 7, August, 1995; 18:(3) 3, November, 1995.

Benjamin, David M. and Buckman, Robert W.: Minimizing the Risk of Adverse Drug Reactions, The Female Patient 21:47-61, April, 1996.

Benjamin, David M.: Putting the Inmates in Charge of the Asylum: Ethical Issues Involved in Government-Sponsored LSD Testing in Unwitting Subjects, (Presented at Annual Meeting of the American Academy of Forensic Sciences, Jurisprudence Section, February 20, 1997).

Benjamin, David M. and Bursztajn, Harold J.: Surreptitious LSD Administration: Ethical, Toxicologic and Psychiatric Impact on Toxic Tort Issues, (Presented at Annual Meeting of the American Academy of Forensic Sciences, Toxicology Section, February 20, 1997).

Benjamin, David M.: Vicarious Liability of Physicians and Hospitals in Drug Product Liability Litigation, (Presented at the Annual Meeting of the American College of Legal Medicine, Ft. Lauderdale, FL, March 7, 1997).

Benjamin, David M.: Onset of Severe Bromocriptine-Related Adverse Effects Correlates Well With Bromocriptine's Pharmacokinetic Profile, (Presented at the Annual meeting of the American Society for Clinical Pharmacology and Therapeutics, San Diego, CA, March 8, 1997).

Benjamin, David M. and Buckman, Robert W.: Selecting New Drugs for the Hospital Formulary, Medical Sciences Bulletin, 1997;20(2):9.

Benjamin, DM: Pharmacist/Pharmacy Negligence Litigation, Medical Science Bulletin, 1997;20(3):8.

Benjamin, David M., Mediation: A Better, Faster, Cheaper Way to Resolve Health Care Disputes, Massachusetts Lawyers Weekly, May 12, 1997, p. B5.

Benjamin, David M.: Alpha Blockers and the Law, (Presented at Annual Meeting of the American Academy of Forensic Sciences, Toxicology Section, February 11, 1998).

Benjamin, David M.: The Death of J. Edgar Hoover - Pharmacological Afterthoughts (Presented at: American Academy of Forensic Sciences, Jurisprudence Section, February 13, 1998).

Benjamin, David M.: Session Moderator, Contributed Papers, Annual Meeting of the American College of Legal Medicine, Las Vegas, Nevada, March 19, 1998.

Benjamin, David M.: The Use of Medical Negligence Data in the Development of Risk Management Programs, (Presented at Annual Meeting of the American College of Legal Medicine, Las Vegas, Nevada, March 19, 1998).

Benjamin, David M.: Pharmaceutical Risk Management: Special Problems Encountered in the Hospital Setting, J. Healthcare Risk Management, 1998;18:3 (winter) updated in spring edition.

Benjamin, David M.: Alcohol from Cough Syrup, Medical Review Officer Update, February 1999.

Benjamin, David M.: Exhumation of Saponified Remains Determining Manner of Death: Malinda McIntosh - Pharmacologic Analysis. (Presented at: American Academy of Forensic Sciences, Jurisprudence Section, February 18, 1999).

Benjamin, David M.: Combinations of Ethanol and Prescription Drugs While Driving: Factoring Out the Effects of Ethanol. (Presented at: American Academy of Forensic Sciences, Toxicology Section, February 19, 1999).

Benjamin, David M.: Symposium Chairperson: Mass Toxic Torts - Protecting the Public View While Advancing Medical Science: The Thin Red Line (Presented: the Annual Meeting of the American College of Legal Medicine, New Orleans, LA, March, 1999).

Benjamin, David M.: Pharmacological Overview of Mass Tort Litigation, (Presented: the Annual Meeting of the American College of Legal Medicine, New Orleans, LA, March, 1999).

Benjamin, David M.: Testing for Drugs in the Exhumed Body: Confounding Issues in Quality Control, Specificity and Reliability, International Association of Forensic Sciences, Aug. 26, 1999, LA, CA.

Benjamin, David M.: Redesigning Drug Approval - Redefining Drug Safety: The Felbamate-Bromfenac Paradigm, (Presented at the Annual Meeting of the American College of Clinical Pharmacology, Sept. 18, 1999, Rockville, MD).

Benjamin, David M.: Evaluating Claims for Medication Errors, (Presented at the Annual Meeting of the American Society for Healthcare Risk Management, Oct. 5, 1999, Chicago, IL)

Benjamin, David M. and Starrs, James E.: Presenting Scientific Evidence in Court: Meeting the *Daubert* Standard for Reliability, (Presented at: the 52nd Annual Meeting of the American Academy of Forensic Sciences, Co-sponsored by the Toxicology and Jurisprudence Sections, Reno, Nevada, February 21, 2000).

Benjamin, David M.: Chair, Teaching Forum: Educational Issues in Clinical Pharmacology: Updating the Curriculum for the New Millennium, 29th Annual Meeting of the American College of Clinical Pharmacology, Chicago, IL, September 19, 2000.

Benjamin, David M.: Medication Mis-Adventures: Case Studies in Clinical Pharmacology, 29th Annual Meeting of the American College of Clinical Pharmacology, Chicago, IL, September 19, 2000.

Benjamin, David M.: Are Pharmacologists/Toxicologists Without Medical Degrees or MDs Best Qualified to Testify About Drugs? (Presented at: American Academy of Forensic Sciences, Jurisprudence Section, Seattle, WA, February 23, 2001).

Benjamin, David M.: Common Defenses Asserted Against Driving Under the Influence of Drugs Claims. (Presented at: American Academy of Forensic Sciences Toxicology Section, Drug & Driving Committee Workshop: Drugs, Driving and Human Performance Testing, Seattle, WA, February 20, 2001).

Benjamin, David M. and Starrs, James E.: Abuse of Experts or Experts of Abuse? (Presented at: American Academy of Forensic Sciences, Co-sponsored by the Toxicology and Jurisprudence Sections, Seattle, WA, February 20, 2001).

Benjamin, David M.: Drug Approvals, Drug Withdrawals: Deja Vu All Over Again, Pharmaceutical & Medical Devices Law Bulletin, Vol. 1, No. 6, June 2001.

Benjamin, David M.: Chair, Teaching Forum: Minimizing Medication Errors: Practical Pointers for

Prescribers, 30th Annual Meeting of the American College of Clinical Pharmacology, Vienna, VA, September 24, 2001.

Benjamin, David M.: Reducing Medication Errors and Increasing Patient Safety: Case Studies in Clinical Pharmacology, 30th Annual Meeting of the American College of Clinical Pharmacology, Vienna, VA, September 24, 2001.

Benjamin, David M.: Applications and Limitations of Back Extrapolation in Expert Testimony, Massachusetts Lawyers Weekly, page B-5, August 20, 2001.

Benjamin, David M.: Reducing Medication Errors and Increasing Patient Safety, (Presented at the Annual Meeting of the American Society for Healthcare Risk Management, Oct. 31, 2001, Boston, MA).

Benjamin, David M.: Reducing Medication Errors and Increasing Patient Safety Through Better Communication, Focus on Patient Safety, National Patient Safety Foundation, 2001;4:6,8.

Benjamin, David M.: Patient Safety and New Drugs: View of a Clinical Pharmacologist, The More Things Change, the More Things Stay the Same Journal of Quality Health Care, 2002;1:17-21.

Benjamin, David M.: Driving Under the Influence of Medications: Are Physicians and Pharmacists Adequately Informing Their Patients of the Risks of Medication Use? News & Vies (newsletter of Toxicologie Section of the AAFS) May 2002.

Benjamin, David M.: Chair, Teaching Forum: Legal Medicine for Clinical Pharmacologists, 31st Annual Meeting of the American College of Clinical Pharmacology, San Francisco, CA, September 23, 2002.

Benjamin, David M.: Theories of Liability Against Pharmaceutical Manufacturers, Investigators, Their Staffs, Hospitals, Medical Schools & IRBs 31st Annual Meeting of the American College of Clinical Pharmacology, San Francisco, CA, September 23, 2002.

Benjamin, David M.: Development of Drugs and Dissemination of Safety Information by Healthcare Professionals (Presented at: American Academy of Forensic Sciences, Toxicology Section, Chicago, IL, February 20, 2003).

Benjamin, David M.: Biological & Chemical Weapons: Perspectives in Clinical Pharmacology (Presented at: American Academy of Forensic Sciences, Toxicology Section, Chicago, IL, February 21, 2003).

Benjamin, David M.: Medical, Legal and Public Policy Issues Arising out of Biological & Chemical Weapons (Presented: the Annual Meeting of the American College of Legal Medicine, Phoenix, AZ, February 28, 2003).

Benjamin, David M. and Blum, Richard S.: "Off-Label" Prescribing of Drugs: Are You Legal or Liable? (Presented: the Annual Meeting of the American College of Legal Medicine, Phoenix, AZ, February 28, 2003).

Blum, Richard S. and Benjamin, David M.: The Dependence-Addiction Paradigm: Good vs. Bad - Treatment vs. Abuse (Presented: the Annual Meeting of the American College of Legal Medicine, Phoenix, AZ, February 28, 2003).

Benjamin, David M.: Minimizing Medication Errors: Practical Pointers for Prescribers, (Symposium Introduction) J Clin Pharmacol 2003;43:751-753.

Benjamin, David M. and Pendrak, Robert F.: Medication Errors: An Analysis Comparing PHICO's Close Claims Data and PHICO's Event Reporting Trending System (PERTS), J Clin Pharmacol 2003;43:754-759.

Benjamin, David M.: Reducing Medication Errors and Increasing Patient Safety: Case Studies in Clinical Pharmacology, J Clin Pharmacol 2003;43:768-783.

Benjamin, David M.: Chair, Teaching Forum: Ethics in Medicine, 32nd Annual Meeting of the American College of Clinical Pharmacology, Tampa, FL, September 23, 2003.

Benjamin, David M.: The History of the Informed Consent Doctrine, 32nd Annual Meeting of the American College of Clinical Pharmacology, Tampa, FL, September 23, 2003.

Benjamin, David M. : Symposium Chair : Application of the Principles of Pharmacology and Pharmacokinetics to the Interpretation of Drug Blood Levels. (Presented at: American Academy of Forensic Sciences, Las Vegas, NV, February 17, 2004).

Benjamin, David M. : Use of the Covino Algorithm in Evaluating the Additive Toxicity of Lidocaine and Propivacaine. (Presented at: American Academy of Forensic Sciences, Toxicology Section, Las Vegas, NV, February 18, 2004).

Benjamin, David M. : The Death of Ted Binion: Drug OD/Suicide or Murder by Poisoning – When the Average Means Too Much. (Presented at: American Academy of Forensic Sciences, Last Word Society, Las Vegas, NV, February 19, 2004).

Benjamin, David M. : Jurors' Right to Question Testifying Expert Rights Lawyers' Wrongs. (Presented at: American Academy of Forensic Sciences, Jurisprudence Section, Las Vegas, NV, February 20, 2004).

Benjamin, David M.: Avoiding Medication Error: Using Therapeutic Drug Monitoring to Optimize Pharmaceutical Care with Gentamicin. *Protecting Your Practice*, February 2004, Farmers' Insurance.

Benjamin, David M.: Risk Management Strategies for Reducing Medication Errors. (Presented: the Annual Meeting of the American College of Legal Medicine, Las Vegas, NV, March 5, 2004).

O'Donnell, James T. and Benjamin, David M.: Systems Failure in Oncology Drug Administration: Intrathecal Vincristine Leads to Permanent Paralysis. (Presented: the Annual Meeting of the American College of Legal Medicine, Las Vegas, NV, March 5, 2004).

Benjamin, David M.: Reducing Medication errors by Re-Designing Your Medication Use Process. *Healthcare Perspectives*, April 2004, Farmers' Insurance.

Reporting of Side Effects and Drug Toxicity To FDA, Advanced Course for FDA Drug Investigators, College of Physicians and Surgeons, Columbia University, New York, New York, September 30, 1980.

The Regulation of New Drug Development and its Relationship to Drug Product Liability Litigation, Pre-Meeting Workshop, Annual Meeting of the National Forensic Center, Miami, FL, December 2, 1988.

The History and Pathogenesis of L-Tryptophan-Induced Eosinophilia Myalgia Syndrome (EMS) and Approaches to Treatment. Presented: National ATLA meeting San Diego, CA, July, 1990.

A History of Drug Product Liability Litigation & The L-Tryptophan Tragedy, November 19, 1990, Selecting & Working With Experts, Feb. 24, 1997, Stetson University College of Law, St. Petersburg, FL

The Adulteration of L-Tryptophan. Presented at the ATLA, L-Tryptophan/EMS Educational Update Meeting, Albuquerque, NM, December, 1990.

Good Manufacturing Practices (GMPs) and Their Application to the Synthesis and Administration of Radiopharmaceuticals in Positron Emission Tomography (PET) Scanning, Massachusetts General Hospital, Dept. of Nuclear Medicine, Boston, MA, April, 1991.

Testifying As An Expert In Court: Legal And Ethical Guidelines, Presented at the Annual Meeting of the National Forensic Center, Orlando, FL, Dec. 8, 1991.

The Development and Testing of New Drugs and Biologicals With Special Reference to Pharmacokinetics, and The Pharmacoepidemiology of Adverse Drug Reactions. Biogen Inc., Cambridge Mass., Feb. 23, 1994.

Understanding the Analysis of Blood & Urine Samples for Drug Abuse. Mass. CLE. 11/22/94 & 9/13/95.

The Clinical Pharmacology of Risk Management. Tufts University School of Medicine, Division of Clinical Pharmacology, Boston, Mass., February 24, 1994, February 22, 1995, May 1, 1997.

Food and Drug Law 4/21/94. Regulation of New Drug Development and Public Policy Issues 4/13/95 Fordham University School of Law, New York, New York.

Risk Management Issues: Am I Going To Be Sued?, Boston Joint School Geriatrics Symposium: Practical Issues in the Care of the Elderly, Harvard Medical School, Boston, MA, January 21, 1995.

The Role of the Occupational Health Professional in the Toxic Chemical Exposure Case, Harvard School of Public Health, Boston, MA, March 20, 1995, April 1, 1996, April 21, 1997, March 9, 1998.

The Pharmacology of Blood Alcohol. Liquor Liability Update '96, 2/13/96; Liquor Liability Update '98, 7/27/98; OUI: The Basics and More. 5/5/96 Mass. CLE.

Benjamin, David M. and Bush, Donna M.: Preparing for Cross-Examination: Developing Active Listening Skills. Annual meeting of the American Academy of Forensic Sciences, Nashville, TN, Feb. 20, 1996.

Preparing to Testify as an Expert - Session Moderator: Expert Negligence Revisited: Mattco Forge v. Arthur Young & Co., & Developing "Active Listening" Skills, Annual Meeting of the American College of

Wecht, Cyril and Benjamin, David M.: Evaluation and Commentary of the Strengths and Weaknesses of the Experts in the O. J. Simpson Trial. Annual Meeting of the American College of Legal Medicine, Las Vegas, NV, March 8, 1996.

Substance Abuse and Motor Vehicle Operation. State of Connecticut Department of Motor Vehicles' Medical Advisory Board, Wethersfield, CT, May 2, 1996.

Forensic Pharmacology. Brigham and Women's Hospital, Boston, MA, Aug. 14, 1996.

Risk Management Strategies for Minimizing Liability During Drug Development, ACI Conference on Drug and Medical Device Litigation, New York, NY, December 6, 1996.

The Use of Mediators With "Subject Matter Knowledge" in the Resolution of Health Care Disputes. The Center for Medical Ethics and Mediation, San Diego, CA, March 9, 1997.

Case Studies in Pharmacist/Pharmacy Negligence, Brigham and Women's Hospital, Boston, MA, Dec. 1997.

How to Stay Out of Hot Water! Reduce Your Medical Liability Exposure, PHYCOR IPA OFFICE MANAGEMENT SEMINAR, Dallas, Texas, February 26, 1998.

Reducing Medication Errors, Southwest Physicians Group, Dallas, Texas, February 27, 1998.
Pharmaceutical Risk Management, American Board of Quality Assurance and Utilization Review Physicians, Tampa, FL, February 28, 1998.

Managing Risk and Errors in Medicine, Panel Member, American Board of Quality Assurance and Utilization Review Physicians, Tampa, FL, February 28, 1998.

Preparing to Testify as an Expert in Occupational and Environmental Medicine, American Occupational Health Conference, Boston, MA, April 29, 1998.

New Developments in the Admission of Scientific Evidence in Court, Annual Meeting of the International Association of Accident Reconstruction Specialists, July 13, 1998, Boston, MA.

Risk Management, Medical Grand Rounds, Department of Internal Medicine, University of Florida Health Science Center, Jacksonville, Florida, October 28, 1998.

Risk Management Strategies for Preventing Medication Errors, Medical Grand Rounds, University of Florida College of Medicine, Shands Teaching Hospital, Gainesville, Florida, October 29, 1998.

Evolving Strategies for Minimizing the Risk of Medication Errors, American Board of Quality Assurance & Utilization Review Physicians, "The Future of Health Care, 2000 and Beyond", San Antonio, Texas, November 14, 1998.

Daubert v. Merrell Dow Pharmaceuticals and the Introduction of Scientific Evidence; Analyzing Forensic Cases Involving Ethanol; How the Expert Can Assist the Attorney in Understanding Scientific Evidence; Medical Jurisprudence, Stetson College of Law, St. Petersburg, Florida, 3 semesters in each of 1997 & 1998.

Constitutional and Evidentiary Issues in Testifying as an Expert in a Drug Testing Case, Annual Meeting

Risk Management Strategies for Reducing Medication Errors in Pharmacy Practice, Kaiser Healthcare, Department of Pharmacy, Kansas City, MO, February 12, 1999.

Minimizing Medication Errors in Your Practice, Department of Medicine, VA Medical Center, Shreveport, LA, April 8, 1999.

Reducing the Risk of Medication Errors and Medical Negligence, Louisiana Association for Healthcare Quality, Shreveport, LA, April 9, 1999.

Medical, Legal & Risk Management Issues for the Judicious Use of Medications by Neurologists, 51st Annual Meeting of the American Academy of Neurology, Toronto, Ontario, Canada, April 22, 1999.

Technology and Blood Alcohol, Traffic Court Technology Seminar for Judges, Newport, RI, April 30, 1999.

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How to use Failure Mode Effect Analysis (FMEA) to identify areas of risk in your medication management system. David M. Benjamin, John Santell and Glenn Krasker. National Audio Conference, November 19, 2003. Sponsored by HCPro.

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PEARLS for Medication Error Reduction, David M. Benjamin, PhD, Chair, American Society for Healthcare Risk Management, October 2001.

- A. Exhibits to be used as a summary of, or as support for the opinions of David M. Benjamin, Ph.D
1. September 26, 2003 bill for the group believed to include Jeffrey Southworth, and the RARE Hospitality International, Inc., d/b/a Longhorn Steakhouse Audit Report of that date, reflecting food and beverages believed served to the Southworth group
 2. Widmark computer calculations, copies of which are included with Dr. Benjamin's report
 3. Chart from Chapter II entitled, "Acute Alcoholic Intoxication" from the 1968 American Medical Association publication "Alcohol and the Impaired Driver"
 4. Various portions of Exhibit 5, entitled "Server Guide" and Exhibit 6, entitled "Manager Resource" to the deposition of Charles Boullaine
- B. Compensation for Dr. Benjamin's time in court is \$500 per hour

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1 Volume II
2 Pages 1 - 127
3 Exhibits 9 - 15

4 UNITED STATES DISTRICT COURT
5 DISTRICT OF MASSACHUSETTS
6 No. 05-CV10617MLW

7 NANCY ROSARIO, INDIVIDUALLY, AS SHE)
8 IS THE ADMINISTRATRIX OF THE ESTATE OF)
9 AWILDA SANTIAGO, ESSEX PROBATE COURT)
10 DOCKET 03P-2499ADI, P/P/A VERONICA)
11 ROSARIO AND CHRISTINA SANTIAGO, AND AS)
12 SHE IS THE ADMINISTRATRIX OF THE ESTATE)
13 OF JOSE SANTIAGO, BERLIN (CONNECTICUT)
14 PROBATE COURT CASE #03-0713)
15 Plaintiffs)
16)
17 vs.)
18)
19 RARE HOSPITALITY INTERNATIONAL, INC.,)
20 D/B/A LONGHORN STEAKHOUSE,)
21 Defendants)

22 CONTINUATION OF DEPOSITION OF DAVID
23 M. BENJAMIN, taken on behalf of the defendants, pursuant to
24 the Federal Rules of Relations Procedure, before Josephine
C. Aurelio, Registered Professional Reporter, a Notary
Public within and for the Commonwealth of Massachusetts, at
the Law Offices of Gillis & Bikofsky, 1150 Walnut Street,
Newton, Massachusetts, on Friday, February 9, 2007,
commencing at 2:09 p.m.

GABRIEL & SWEENEY COURT REPORTING
15 Van Wart Path | 19 Summer Street
Newton, MA 02459 | Acton, MA 01720
(617) 969-4791 Phone (978) 266-1352

2

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7 DAVID BIKOFSKY, ESQ.
8 NEIL SCHNURBACH, ESQ.
9 Gillis & Bikofsky
10 1150 Walnut Street
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12 representing the defendants

13 VIDEO OPERATOR, BRETT ST. GELAIS
14 National Video Reports, Inc.
15 58 Batterymarch Street, Suite 243
16 Boston, MA 02110

2-3

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3 DAVID M. BENJAMIN	4	
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6 EXHIBITS		
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2-

1 PROCEEDINGS

2

3 DAVID M. BENJAMIN, called by the

4 defendant, first having been satisfactorily identified by

5 the production of his Massachusetts driver's license, and

6 previously duly sworn by the Notary Public, on oath deposes

7 and says as follows:

8 CONTINUATION OF DIRECT EXAMINATION

9 BY MR. GILLIS

10 VIDEO OPERATOR: We're now recording and on

11 the record. My name is Brett St. Gelais. I'm a legal

12 video specialist for National Video Reporters. Our

13 business address is 58 Batterymarch Street, Suite 243,

14 Boston, Massachusetts, 02110.

15 Today's date is February 9, 2007, and the

16 time is 2:09 p.m.

17 This is the deposition of Doctor David

18 Benjamin in the matter of Nancy Rosario, et al, plaintiff,

19 versus Rare Hospitality International, Incorporated, d/b/a,

20 Longhorn Steakhouse, defendants, in the U.S. District

21 Court, District of Massachusetts, Case No. 05-CV10617MLW.

22 This deposition is being taken at 1150

23 Walnut Street, Newton, Massachusetts, on behalf of the

24 defendant. The court reporter is Josephine Aurelio of

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1 Gabriel & Sweeney.
 2 Counsel, will you please state your
 3 appearance, and will the court reporter administer the
 4 oath.
 5 MR. FARRAH: I'm Albert Farrah, and I
 6 represent the plaintiffs in this action.
 7 MR. GILLIS: My name is Michael Gillis.
 8 I'm here representing the defendants in this action. With
 9 me, but just left the room, is Attorney Neil Schnurbach.
 10 Also present is Attorney David Bikofsky, all
 11 representing the defendants in this action.
 12 Q. Doctor Benjamin, you understand that you're still
 13 sworn from the prior portion of this deposition, correct?
 14 A. Yes, I do.
 15 MR. GILLIS: Before we go on the record, I
 16 just want to state that the plaintiffs have provided us,
 17 which we'll get marked as an exhibit, documents that were
 18 sent by plaintiff's counsel, Albert Farrah, to our office
 19 on February 1 which is since the last day of Doctor
 20 Benjamin's deposition.
 21 I feel compelled to put the statement that
 22 on the record that on May 16, 2005, Doctor Benjamin filed a
 23 60-J affidavit in connection with this matter wherein he
 24 expressed certain opinions relative to Jeff Southworth's

2-7

1 information or facts not available for answer when filed in
 2 the Rule 26 disclosure was filed.
 3 Thus, I'm reserving all rights to strike
 4 Doctor Benjamin's supplemental answers and any new Rule 26
 5 disclosure that is filed.
 6 I'm reserving all rights to strike Doctor
 7 Benjamin's supplemental or different opinions expressed
 8 therein.
 9 In light of Doctor Benjamin's schedule and
 10 the deadline set by the Court in this litigation, we intend
 11 to go forward today with the deposition and prior
 12 testimony, prior expert opinions of Doctor Benjamin. We
 13 reserve all rights to file an appropriate motion to strike.
 14 Moreover, in the event that the motion is
 15 denied, we're reserving our rights to have another
 16 opportunity to depose Doctor Benjamin concerning his new
 17 opinions and will seek costs for the cost of the deposition
 18 today based on the outdated testimony of Doctor Benjamin.
 19 MR. FARRAH: Do you want me to respond?
 20 MR. GILLIS: You can do whatever you'd like,
 21 but I want to mark this first as the submission we got from
 22 you dated February 1, and then we'll also mark the second
 23 submission which is being copied right now which was your
 24 letter, I believe dated January 29, to our office with

2

1 consumption of alcohol, his state of intoxication at the
 2 Longhorn Restaurant on the evening of September 26, 2003.
 3 He again expresses his opinions in the
 4 plaintiffs' answers to interrogatories filed on or about
 5 July 14 2006.
 6 On October 31, 2006, the plaintiffs filed a
 7 Rule 26 disclosure containing Doctor Benjamin's opinions
 8 and expected testimony concerning Southworth's consumption
 9 of alcohol, his state of intoxication at the Longhorn
 10 Restaurant on September 26, 2003.
 11 The opinions and expected testimony
 12 contained in the disclosure differed markedly from those
 13 expressed in the 60-J affidavit and the plaintiff's answers
 14 to interrogatories.
 15 On January 26, 2007, Doctor Benjamin's
 16 deposition was commenced, and following the deposition, we
 17 received on date of February 1, 2007 a supplement to Doctor
 18 Benjamin's Rule 26 disclosure which was filed with our
 19 office.
 20 Once again, Doctor Benjamin expressed new
 21 opinions inconsistent and different from the previous ones
 22 expressed.
 23 Further, it's clear that the supplement,
 24 that the new inconsistent opinions are not based on any

2-

1 various materials as well.
 2 (Exhibit Nos. 9,10 marked
 3 for Identification).
 4 MR. FARRAH: Let me say this for the record,
 5 because I think I ought to make a slight, at least a slight
 6 response.
 7 I provided you with both what have been
 8 marked now as Exhibits 9 and 10, so you'll have them and
 9 have an opportunity to examine Doctor Benjamin about the
 10 statements and opinions contained in them.
 11 With respect to the supplemental disclosure
 12 and the reference in the supplemental disclosure to his
 13 Rule 60-J affidavit, I want to point out to you that you've
 14 marked the 60-J affidavit as an exhibit in this deposition
 15 and have asked him a number of questions about the 60-J
 16 affidavit already.
 17 And I don't need to go to the prior day's
 18 deposition to reference those pages, but I think you're
 19 aware of that fact.
 20 With respect to any other portions of this
 21 supplemental disclosure, they are, to my way of looking at
 22 them, consistent with the information already contained in
 23 and an expansion on the Rule 26 report already supplied
 24 you, and I'm going to object to any opportunity to take his

2-9
1 deposition further.

2 And I invite you to continue your inquiry
3 into what he disclosed in his Rule 60-J affidavit and
4 what's disclosed in the supplemental Rule 26 report marked
5 Exhibit 9 and the letter to you of January 29, 2007 marked
6 Exhibit 10.

7 I don't see any remote prejudice to you at
8 this stage of the proceeding in receiving these documents
9 when you received them. But you choose to do what you
10 choose to do in terms of inquiring about what's contained
11 in Exhibits 9 and 10.

12 MR. GILLIS: Well, you're well aware that we
13 just got these last week, and I'm on trial all week and it
14 will be impossible for us to get a full review of this by
15 our experts on this short date.

16 But this was the only date that you were
17 able to provide us in the month of February in order to get
18 Doctor Benjamin's deposition completed, correct?

19 MR. FARRAH: I'm aware of the fact that
20 there are three lawyers sitting in this room during this
21 deposition as there were three lawyers from your firm
22 sitting in the deposition room during the last deposition.

23 There's no effort here to provide you with
24 anything less than a full opportunity to examine this

2-11
1 was he sloppier looking than he usually is? A little bit,
2 yes. Was he louder than he usually appeared? Yeah, I
3 mean, yeah. Were his eyes glassy at all, Line 23? Maybe,
4 yeah.

5 And I know there was one other statement
6 that he wasn't carrying himself the way he normally did.

7 Q. Okay. We went into great detail about the
8 loudness last time, so we don't need to go into that again
9 today. And I believe we carried the carrying as well.

10 But let me ask you one further question
11 about the carrying. Based on everything that you
12 reviewed, how did the way he carried himself that night
13 affect, if you know, the way he was walking when he was at
14 the Longhorn?

15 MR. FARRAH: Objection.

16 A. Well, I don't interpret carrying one's self to
17 refer only when walking.

18 Q. Okay. But was there anything about the way he
19 was carrying himself that evening that you're aware of that
20 showed up in the way he walked?

21 A. I have no other specific facts to go on other
22 than this witness's characterization, that he wasn't
23 carrying himself in the way that he usually did.

24 I wouldn't presume to try to interpret more

2-
1 witness.

2 And if you're telling me that you don't have
3 sufficient time, you didn't have sufficient time to review
4 this, we can talk about -- if you didn't have sufficient
5 time to review Exhibits 9 and 10, we can talk about a
6 continuation of his deposition at a later date. That
7 choice is yours.

8 Q. Doctor Benjamin, I believe when, not too far
9 before the time we finished up the first part of the
10 deposition, we had been going through with you those parts,
11 those visible signs of intoxication that you believe were
12 present in Jeffrey Southworth on the night in question, is
13 that correct?

14 MR. FARRAH: Objection to the form.

15 A. Not really what I believed. What I cited from
16 Jude Connelly's deposition testimony.

17 Q. And just so I can go through them, please restate
18 the visible signs that you believe were apparent in Jeffrey
19 Southworth on the night of this accident -- excuse me -- at
20 the Longhorn Steakhouse on this evening?

21 A. Well, I have his deposition in front of me from
22 the Middlesex Superior Court case, and when he was asked
23 about what did he show that were indicative of
24 intoxication, the response on Page 50 starting at Line 9,

2-1
1 from it except that the only thing that I get out of it
2 when he's sober, he looks differently or carries himself
3 differently. To me, it's the contrast that this gentleman
4 is making.

5 Q. And that's with somebody who has some experience
6 with Jude Connelly and knows him when he's not drinking,
7 correct?

8 MR. FARRAH: Objection.

9 A. Yes.

10 Q. What about the way he was carrying himself would
11 have alerted a waitress that he may have had too much to
12 drink?

13 MR. FARRAH: Objection.

14 A. Once again, I told you that I don't feel that I
15 can interpret that because you would have to ask Mr.
16 Connelly about what he specifically meant.

17 Q. Okay. So as far as visible signs, not carrying
18 himself, you can't say as you sit here today something
19 specifically that he did that alerted, should have alerted
20 the wait staff to his being under the influence based
21 solely on the way he was carrying himself, correct?

22 MR. FARRAH: Objection.

23 A. Well, I'm not sure that I can or cannot. What I
24 can not do is I cannot look inside Mr. Connelly's mind and

2-13

1 no specifically what he was referring to.

2 Q. I agree with you. But from where in a situation

3 where he said he's not carrying himself the same way

4 because he was sleeping at the table, that's an indicia

5 that a wait person should be able to pick up on, correct?

6 MR. FARRAH: Objection.

7 A. Well, if somebody was sleeping on the table or

8 had their head down, you actually made a gesture of like

9 putting your head and your arm down like we all used to do

10 in elementary school when the teacher told us to take nap.

11 I don't know that that occurred.

12 Q. What time during the evening, what time frame was

13 it that Mr. Connelly observed Mr. Southworth not carrying

14 himself the way he normally did?

15 A. There is not a specific reference here to time.

16 Q. Okay. So that --

17 A. Let me finish, please. On Page 49, starting Line

18 12, he is asked, While you were at the Longhorn, did Jeff

19 appear to you to be under the influence of what he had been

20 drinking at the Longhorn?

21 And the answer is, I mean, yeah, a little

22 bit. So the time reference that he gives is while Jeff

23 and the others were at the Longhorn. That's the time

24 reference.

2-15

1 previous day of it, have you reviewed any documents in

2 preparation for today?

3 A. I pulled out Jude Connelly's deposition. I

4 pulled out --

5 Q. And that's in the Southworth Middlesex action,

6 correct?

7 A. Yes, sir, the one I just cited a moment ago. I

8 pulled out Lee Chabot's witness statement, and that's about

9 what I did.

10 I also brought a couple of photos with me.

11 At least one of the photos of Jeffrey you showed me last

12 week was not the one that I had seen and I wanted to be

13 sure you had a opportunity, even though plaintiff's counsel

14 assures me that he sent them all to you.

15 And you did ask me to provide you with a

16 graph for the first half hour, and I ran that out for you.

17 Q. Okay. Let's very quickly mark some of these

18 things.

19 This is, the first one that we'll mark is

20 Exhibit 11, the EZ-ALC, which is the Widmark computer

21 calculation formula you used in these cases to make your

22 calculations, correct?

23 A. Not that I use. Your expert uses the same one.

24 Q. Are these the ones you use, yes or no?

2-1

1 There's no clock time given, just the

2 interval.

3 Q. Okay. And the time that was given for when he

4 felt he was under the influence, correct?

5 MR. FARRAH: Objection.

6 A. I beg your pardon?

7 Q. You just read the time that he was under the

8 influence was while at the Longhorn, is that correct?

9 MR. FARRAH: Objection.

10 A. Yes.

11 Q. It doesn't say specifically what the time frame

12 was for when he wasn't carrying himself, correct?

13 MR. FARRAH: In the deposition that he just

14 read to you, you're asking?

15 Q. Do you have any evidence, evidence from any

16 source that you've reviewed that tells you specifically

17 that some time before he got his last drink that night, he

18 was showing signs of not carrying himself the way he

19 normally does?

20 MR. FARRAH: Objection.

21 A. I think the record does not provide specific time

22 notations, unfortunately.

23 Q. Thank you. Now, by the way, before I forget,

24 since the last deposition, the same deposition but the

2-16

1 A. This is the one I used.

2 Q. Okay. And this is for the time period that

3 wasn't included, that was prior to the starting time that's

4 in your expert report, correct, your Rule 26 submission?

5 A. Please ask that again.

6 Q. This particular page you gave me is starting at

7 7:30 and goes until nine o'clock, correct?

8 A. Yes, it does.

9 Q. And the one in your expert submission starts at

10 nine o'clock, correct?

11 A. That is correct.

12 Q. Okay?

13 MR. GILLIS: Let's have this marked as

14 Exhibit 11.

15 (Exhibit No. 11 marked for

16 Identification).

17 Q. Now, Doctor Benjamin, based on Exhibit 11 here

18 and based on your review of the evidence in this case, do

19 you have an opinion if at any time between 7:30 p.m. that evening and nine o'clock p.m. that evening that Jeffrey

20 Southworth would have been showing any visible signs of

21 intoxication based on his alcohol consumption?

22 MR. FARRAH: Objection.

23 A. Based on his consumption or based on the blood

24

2-17

1 alcohol levels that are shown on the graph?
2 Q. Based on the blood alcohol levels that are shown
3 on the graph.

4 A. The likelihood that he'd be showing visible signs
5 at this point in time are low.

6 Q. You're not going to render an opinion that he
7 showed visible signs of intoxication prior to nine p.m. on
8 that evening, are you?

9 MR. FARRAH: Objection.

10 A. Impairment, maybe. Intoxication, no.

11 Q. What signs of impairment are you aware of that
12 Mr. Southworth exhibited that evening before or up to nine
13 o'clock?

14 MR. FARRAH: Objection.

15 MR. GILLIS: What's the objection?

16 MR. FARRAH: Before or up to.

17 Q. Prior to nine o'clock that evening, are you aware
18 of any visible signs of impairment that Mr. Southworth
19 exhibited on the night of this accident?

20 A. Well, I think that that question really has to be
21 addressed to one of the fact witnesses who was there
22 because, once again, I'm having difficulty interpreting Mr.
23 Connelly's statement who said that Jeff did show signs of
24 being under the influence while he was in the Longhorn.

2-19

1 external visible signs, whereas when you're intoxicated,
2 any person who's ever seen a drunk or a person who's
3 intoxicated would be able to characterize that person as
4 such.

5 Any of the jurors would because we've all
6 gone to weddings, bar mitzvahs, Christmas parties, and we
7 have that in our common knowledge.

8 So impairment starts in the brain first
9 where you have confusion or problems with judgment, and
10 then works its way down to where you're stumbling and
11 stuttering.

12 Q. And .08 is the legal presumption of impairment,
13 not the fact that everybody is impaired at that rate,
14 correct?

15 MR. FARRAH: Objection.

16 A. Certainly, that's a per se level that is adopted,
17 I believe by statute, and that's it. But I think what
18 we're talking about is just the difference between the word
19 impairment and intoxication.

20 Q. You mentioned earlier that you felt he was a
21 little unkempt, is that correct?

22 A. I think that that was, if I mentioned that, I was
23 quoting Mr. Connelly.

24 Q. And unkempt and sloppy looking --

2-

1 Certainly, this time interval represents the
2 time that he was in the Longhorn or a portion of the time
3 he was in the Longhorn.

4 But I said specifically a few moments ago
5 there was no time designation. So I don't have any basis
6 for saying it. But I don't have any basis for saying no,
7 either, Mr. Gillis.

8 Q. As you sit here today, you have no basis for
9 saying that he was impaired prior to nine p.m. on June 26,
10 2007 -- "he" being Mr. Southworth -- at the Longhorn
11 Steakhouse, correct?

12 A. I have a basis saying he's impaired because he's
13 at .08 which is the impairment level in the Commonwealth.

14 I draw a big distinction between the word
15 impairment and the word intoxication, and I believe the
16 Courts do as well.

17 Q. How do they differ?

18 A. Impairment means you're not normal. It doesn't
19 necessarily mean you're showing those signs.

20 So in order to prove impairment, a police
21 officer might interview you and ask you to do some
22 psychomotor testing, or prove your memory, or answer some
23 questions.

24 But you might not be explicitly showing

2-2

1 A. Sloppy looking --

2 MR. FARRAH: I'm sorry. Please let him
3 finish his question so I'll have a change to object if I'm
4 going to object.

5 A. I'm sorry.

6 Q. When you said earlier in your deposition -- and
7 I'll assume you did say it -- that he was unkempt, is that
8 to you synonymous with sloppier looking than normal?

9 A. Yes, and I believe sloppier looking was part of
10 the testimony given at one point in time.

11 Q. So we can use those words interchangeably based
12 on your testimony?

13 MR. FARRAH: Objection.

14 A. If you want to define those -- unkempt and
15 sloppier looking -- to me, unkempt would be, you know, hair
16 disarrayed, maybe shirt pulled out, kind of -- not looking
17 well-groomed.

18 Q. Okay. And what would sloppier looking be in your
19 definition?

20 A. About the same thing. That's why I say, if we're
21 going to define those as being synonymous terms.

22 Q. What were the specific characteristics of Mr.
23 Southworth when he was at the Longhorn Steakhouse on
24 September 26, 2003 that showed that he was sloppier looking

2-21

1 than normal?

2 A. That was never described to my knowledge. The

3 general statement was made.

4 But the things that you just asked me about

5 a moment ago, I didn't read nor do I recall any specific

6 statement about some of the things that might have led him

7 to say that. But it was certainly his impression.

8 Q. What time, hour -- I'll rephrase the question.

9 What specific time during the evening that

10 night at the Longhorn is it that you're understanding is

11 that he looked sloppier than normal?

12 A. Once again, Mr. Gillis, the question is a good

13 question because I never saw a specific time reference.

14 Q. Okay. And you realize they had been dirt

15 biking, correct?

16 A. Yes.

17 Q. And they wore helmets when they were birth

18 biking, correct?

19 A. Yes. I assume so.

20 Q. And that they went directly from dirt biking to

21 the restaurant, correct?

22 A. Yeah.

23 Q. Do you have any evidence that there coming

24 directly from dirt biking is what he meant by sloppier

1 looking than normal compared to anything to do with

2 alcohol?

3 A. You're going to have to ask me that again.

4 Q. Okay. Slopier looking than normal, you can be

5 sloppier looking more than normal from things other than

6 being intoxicated, correct?

7 A. You could just be a slob.

8 Q. Correct. You could have just come from dirt

9 biking, correct?

10 A. Well, you can come from dirt biking and your

11 clothes might be dirty, but you can tuck them in and you

12 can comb your hair even when you took your helmet off.

13 And there were many opportunities when I was

14 a younger man where I played sand lot football with a bunch

15 of guys or baseball and --

16 MR. GILLIS: Move to strike.

17 A. Well, I'm sorry.

18 MR. FARRAH: Let him finish.

19 A. At least let me get it out before you strike it.

20 But there are times where somebody said,

21 let's go visit so and so, or let's go visit so and so, and

22 we were in play clothes with dirt on them.

23 But we tucked our clothes in and we combed

24 our hair, and we had some dirt from the field on us, but we

2-23

1 weren't unkempt or sloppy. We were just a little dirty.

2 Q. Okay. But before you cleaned yourself up, you

3 weren't intoxicated, were you?

4 A. Certainly not.

5 Q. So being sloppier looking than normal is not in

6 and of itself an indicia that someone is intoxicated,

7 correct?

8 A. Well, that depends. Apparently, in Mr.

9 Connelly's mind, when he was asked what were the indicia,

10 he volunteered that freely as his statement.

11 So that had meaning to him, and I can't

12 contradict what he thought was a salient point. So he

13 felt that that was significant.

14 You or I might characterize it differently,

15 and there could be a million other scenarios when something

16 else obtained. But he answered that question and he used

17 those descriptions.

18 Q. What was it about the way Mr. Southworth looked,

19 that being more sloppier than normal, that the wait staff

20 should have picked up on that evening while they were

21 serving him that would have indicated to them that he may

22 have visible signs of intoxication?

23 MR. FARRAH: Objection.

24 A. Once again, you need to address that question to

1 Mr. Connelly, not to myself because I understand the

2 general statement that was made.

3 But I can't break it down to the specifics

4 that you're asking of me.

5 Q. And what I was getting to, you're aware of

6 certain signs that are directly related to intoxication

7 such as a heavy odor of alcohol on your breath, correct?

8 A. Odor of alcohol on the breath is not a sign of

9 intoxication. It's a sign of prior ingestion.

10 Q. And glassy eyes, isn't that normally something

11 you see?

12 MR. FARRAH: Objection.

13 A. Glassy eyes would be, in my estimation, would be

14 a sign of alcohol effect.

15 Q. Slurred speech?

16 A. Yes.

17 Q. What else would be more likely than not to you a

18 sign of, a visible sign of intoxication like slurred

19 speech?

20 A. Slurred speech is another good one,

21 incoordination, being loud or boisterous.

22 Q. But when Mr. Connelly was asked visible signs of

23 intoxication, he didn't say that he was unsteady, Mr.

24 Southworth was unsteady on his feet, did he?

2-25

1 A. They were seated at the time, sir.

2 Q. At any time during the evening, he never said

3 that he got up know and was unsteady on his feet, correct?

4 A. He said what I read to you out of the deposition.

5 Q. He never said he was unable to speak coherently,

6 correct?

7 A. I didn't see that statement.

8 Q. Okay. And you didn't see any incoordination at

9 the table, correct?

10 MR. FARRAH: Objection.

11 A. You mean I didn't read any description of Mr.

12 Southworth having exhibited incoordination at the table?

13 Q. Correct?

14 A. Did not, sir.

15 Q. Okay. You didn't read anything that Mr.

16 Connelly said that Mr. Southworth on that evening had a

17 heavy odor of alcohol on his breath, correct?

18 A. Everybody but Jude was drinking. Knowing that

19 the sense of smell becomes olfactory, once you have it in

20 yourself, you can't smell it in other people too terribly

21 well.

22 Q. There's no indication from Jude Connelly that he

23 thought Mr. Southworth had a heavy a smell of alcohol on

24 his breath, correct?

2-27

1 Q. At the top of Page 51, he says he doesn't

2 remember specifically seeing Mr. Southworth's eyes looking,

3 seeing them glassy, correct?

4 A. Well, he's asking about something else. So why

5 don't we read the whole question and answer again so we're

6 not misleading.

7 Q. I'll read it all. Starting on Line 23 on Page

8 50. Okay. Were his eyes glassy at all? Maybe, yeah.

9 Page 51, At the Steakhouse?

10 Answer: Yeah, I don't remember specifically

11 seeing his eyes, you know, looking, seeing them glassy, but

12 very well, very well could have. That could be.

13 Did I read that properly, Doctor Benjamin?

14 A. You did.

15 Q. Okay. And from that, you've opined that his

16 eyes were glassy --

17 MR. FARRAH: Objection.

18 Q. -- that evening at the Longhorn Steakhouse?

19 MR. FARRAH: Objection.

20 A. Well, I would like to refer you -- I'm opining

21 and basing my testimony on Lines 23 and 24 on Page 50 where

22 he's asked a straightforward question, Were his eyes glassy

23 at all? And as you read correctly, Maybe, yeah.

24 Q. The fact that he follows that answer up with the

2-2

1 A. I did not see any statement to that, but I would

2 not expect to have seen that.

3 Q. Now, the glassy eyes, when that evening at the

4 Longhorn was it your understanding that the eyes were

5 glassy?

6 A. I don't have a clock time for you.

7 Q. And did he say that they were glassy or did he

8 say, may be they were glassy?

9 A. Well, I see you have a page out of the

10 deposition. You have me at a disadvantage.

11 Q. Look at the bottom of Page 50. You have it right

12 in front of you?

13 A. Okay. I'm looking at the bottom of Page 50.

14 Q. Were they glassy at all? Maybe, yeah, correct?

15 MR. FARRAH: Did you just read from the

16 deposition?

17 MR. GILLIS: Yes, Lines 23 and 24 on Page

18 50.

19 MR. FARRAH: Could you read them again?

20 I'm sorry? The question was what? I don't have it in

21 front of me.

22 Q. Were his eyes glassy at all? Maybe, yeah.

23 That's the answer, correct?

24 A. Maybe, yeah, right.

2-2

1 statement that he wasn't specifically even looking at his

2 eyes that night, that didn't enter into your opinion at

3 all, doctor?

4 MR. FARRAH: Objection. I'm sorry, is that

5 what it says, I specifically wasn't looking at his eyes?

6 MR. GILLIS: I don't remember specifically

7 looking at his eyes.

8 MR. FARRAH: I didn't hear it the second

9 time. I just wanted to make sure.

10 A. Well, the next statement in that deposition kind

11 of contradicts the prior one because he's asked, Were his

12 eyes closed somewhat when he was at the Steakhouse? And he

13 says, No.

14 And I contend to you that if he says he

15 wasn't looking at his eyes, how could he answer yes or no.

16 Q. So you find the testimony to be contradictory on

17 that issue?

18 MR. FARRAH: Objection.

19 A. I wouldn't call it contradictory. I would just

20 say that sometimes follow-up questions tend to dilute the

21 thrust of a prior question. That's all I'm saying.

22 And that sometimes, there's some obfuscation

23 of the record, and it's difficult to be able to extract

24 exactly what was there. But the definitive and

2-29

1 declarative statements speak for themselves.

2 Q. As far as obfuscation, you realize this is Mr.
3 Farrah asking these questions, correct?

4 A. I'm talking about the record that's there
5 somehow. The record is sometimes difficult for me to
6 understand.

7 Q. Did you find to a reasonable degree of scientific
8 certainty that for purposes of your opinion, his eyes were
9 glassy that evening while at the Longhorn?

10 MR. FARRAH: Objection.

11 A. I think that if you asked me did I cite or did I
12 rely on certain statements that Jude Connelly made among
13 which was that the eyes were glassy, yes, I did rely on
14 that.

15 Q. And again, the same question. I have to ask
16 these questions. During what time period while at the
17 Longhorn that evening were his eyes in your opinion glassy?

18 A. I cannot respond to that question. I have no
19 answer for that question. I have no basis for answering
20 that question.

21 I would have to say between the time -- and
22 I don't mean this to be facetious, but between the time
23 they arrived and prior to when they left, probably
24 certainly more towards the latter part of the time when

2-31

1 we're now back on the record.

2 Q. Doctor, during the break, we were able to locate
3 Exhibit 2 in this, previously marked Exhibit 2 in this
4 deposition which is entitled, affidavit of David M.
5 Benjamin, Ph.D., is that correct?

6 A. Yes, it is.

7 Q. And this affidavit was filed with you in
8 conjunction with the plaintiff's 60-J submission to the
9 Court in this case, correct?

10 A. That is correct.

11 Q. Okay. And the opinions that you expressed in
12 here had held to you to a reasonable degree of scientific
13 certainty, is that correct?

14 A. Yes.

15 Q. Okay. And in there, you give a little bit of
16 your background, correct?

17 A. Yes.

18 Q. And the background qualifications I believe are
19 Paragraphs 2 thru 7, correct?

20 A. Yes.

21 Q. And in Paragraph 3, you talk about numerous
22 teaching positions, correct?

23 A. Yes.

24 Q. Which of these positions deal strictly with

2-3

1 more drinks had been consumed, but I think we all agree,
2 Mr. Gillis, there is no, somebody saying, at 9:02, he
3 looked fine, and at 9:27 he looked terrible.

4 Q. You can't differentiate on those time frames,
5 correct?

6 MR. FARRAH: Objection.

7 A. I wouldn't use those time frames to
8 differentiate. I'd be using the blood alcohols and the
9 rate of ingestion of the drinks.

10 Q. I just want to shift gears for a little while.
11 In addition to this affidavit which is the Rule 26
12 submission -- that's what we've been calling it -- you
13 submitted in this case a 60-J affidavit, correct?

14 A. I guess I submitted or --

15 MR. FARRAH: I object to the form of that
16 question, but go ahead.

17 A. I submitted an affidavit in conjunction with
18 plaintiff's 60-J affidavit.

19 MR. FARRAH: I think it's Exhibit 2 in this
20 deposition.

21 VIDEO OPERATOR: It's now 2:45 p.m. and
22 we're now off the record.

23 (Discussion off the record).

24 VIDEO OPERATOR: The time is 2:53 p.m. and

2-3

1 intoxication from ethanol as opposed to some other field of
2 toxicology?

3 A. You notice that I have mentioned Stetson
4 University, College of Law?

5 Q. Yes.

6 A. I gave a couple of programs on liquor liability
7 at Stetson Law School.

8 Q. When you say programs, were these semester long
9 courses or just one afternoon program?

10 A. They were like two-hour presentations in a
11 medical injuries prudence class, and my topic for that
12 night was to discuss liquor liability.

13 Q. Anything else that you can point out from that
14 paragraph?

15 MR. FARRAH: Objection. What do you mean
16 by, anything else you can point out?

17 Q. Anything else you can point out from that
18 paragraph that's related to what I asked you earlier, that
19 being specifically related to intoxication due to ethanol
20 as opposed to other areas of toxicology?

21 A. In that paragraph, I would say that of the
22 teaching venues that are in Paragraph 3, that's the one
23 that I specifically recall teaching about liquor liability.

24 Q. And you believe you did that on two occasions?

2-33

1 A. I believe so.
2 Q. And what years were those?
3 A. Probably in the early to mid '90s.
4 Q. Okay. Paragraph 4, which of the various
5 seminars that you cite here deal solely with the effects of
6 ethanol on a person in a civil context as opposed to a
7 criminal context?
8 A. Well, --
9 MR. FARRAH: Solely, is that the question?
10 MR. GILLIS: Yes.
11 A. Well, my presentations don't distinguish between
12 civil and criminal.
13 Q. Okay.
14 A. They talk about how alcohol is handled in the
15 body.
16 Q. Can you tell me which one of these seminars if
17 you're aware deal with the issue of whether a person
18 becomes visibly intoxicated as opposed to, as you know, in
19 the criminal setting, impaired?
20 A. I think in every instance that I teach, I teach
21 the general formats that we went through last time, that
22 especially in naive individuals, that a .15 blood alcohol,
23 .15 percent is generally considered to be a blood level
24 where nontolerant individuals would show visible signs of

2-35

1 seminars, did you teach anything other than .15 being the
2 standard, alibi people may change?
3 MR. FARRAH: Objection.
4 A. But I can't answer it just yes or no. I have to
5 clarify because I teach basically the same thing which is
6 basically what you read out of the MCLE presentation.
7 It would be pretty stupid for anyone to say
8 that one number is the number for everybody in the whole
9 wide world.
10 Q. I'm not suggesting that.
11 A. I thought you were.
12 Q. You understand that standard doesn't mean the
13 same in every single case. It's just that's the standard,
14 correct?
15 MR. FARRAH: Objection.
16 A. Well, that is a number that has some meaning to a
17 group of educated toxicologists.
18 Q. Paragraph 5, have you given any speeches to --
19 strike that.
20 Paragraph 5, which of these organizations
21 are you currently still a member of?
22 A. I'm still a fellow of the American College of
23 Clinical Pharmacology. I'm still a fellow of the American
24 College of Legal Medicine.

2-3

1 intoxication.
2 Q. Are you aware of any of the seminars that you
3 taught in in Paragraph 4 where you taught other than .15
4 being the standard for visible intoxication for nontolerant
5 drinkers?
6 A. I would say that I almost always say that .15 is
7 the number, quote unquote, the number. But just as you
8 read out of the MCLE portion of my submission to MCLE, does
9 that mean that everyone who will be .15 will be visibly
10 intoxicated, the answer is no.
11 And does that mean that everyone who is
12 under .15 will not be visibly intoxicated, and the answer
13 was of course not.
14 So I teach that while .15 is a reasonable
15 standard and generally accepted throughout the forensic
16 toxicology community, there's so much variability among
17 individuals, and in terms of how much volume of liquor is
18 ingested, what the proof of the liquor is --
19 Q. Are we still answering the question?
20 A. I am, of course I am.
21 Q. In any of those seminars, did you teach that .15
22 was not the standard?
23 We understand that people can show at
24 different points. But the question was: In any of these

2-3

1 I'm still a fellow of the American Academy
2 of American Scientists in the toxicology section, and I'm
3 still a fellow of the American Society of Health Care Risk
4 Management.
5 I continue to be a member -- there's no
6 fellowship -- well, I continue to be a full member in the
7 American Academy of Criminal Toxicology, and so I'm still
8 active in all of those organizations.
9 Q. And you mentioned that you've read a chapter in
10 the Forensic Science Handbook, Volume 3, correct?
11 A. Yes.
12 Q. Do you find that to be a treatise that you rely
13 upon, that handbook in the course of your business?
14 MR. FARRAH: Objection. Volume 3 of the
15 Forensic Science Handbook?
16 MR. GILLIS: Yes.
17 A. Do I rely upon that in the course of my work?
18 Q. Yes.
19 A. I don't really refer too much to it because the
20 knowledge that I have is in my brain.
21 Q. Well, do you refer to it as a peer reviewed
22 document?
23 MR. FARRAH: Objection.
24 A. It's peer reviewed. It's reviewed by people

2-37

1 before it's published.

2 Q. Is it a learned treatise in your area?

3 A. When that handbook was reviewed by the American
4 Academy of Forensic Scientists, they referred to it as a
5 learned treatise.

6 Q. Do you believe it's a learned treatise?

7 A. If one of my learned colleagues who's objective
8 labeled it as a learned treatise, I don't think I'd quibble
9 with him.

10 Q. Well, the article you wrote for that, do you
11 consider that to be a learned treatise?

12 A. He included my -- it's not an article. It's a
13 chapter, and he included my chapter among those that was
14 referred to as a learned treatise.

15 Q. So is that a yes or no?

16 A. That's what it is. I said what I said.

17 Q. Paragraph 8, you talk about various exhibits that
18 you reviewed in order to put together this affidavit,
19 correct?

20 A. Yes.

21 Q. Are you aware of any documents that are not
22 included in here that you have reviewed since then that
23 would change your opinion in this affidavit?

24 A. Would you repeat that, please?

2-39

1 the Jack Manhattans were served, and I would have liked to
2 have had the Jack Manhattans, one of them, anyhow, taken
3 out of the Longhorn so that we could have had the alcohol
4 content and the volume measured and calculated.

5 Q. From the time that you got involved with this
6 case up until today, have you ever had a glass, the type of
7 glass that's used at the Longhorn Steakhouse for making
8 this type of drink?

9 A. I haven't had a glass, no.

10 Q. Okay. Have you had a replica of any kind?

11 A. Would you consider a photo a replica?

12 Q. Other than the photo, have you had anything?

13 A. No.

14 Q. Okay. You do have photos which you produced
15 last time -- well, which have been produced since, correct,
16 photos of the glass?

17 A. I don't know. I could show you an example, and
18 you could tell me if they've been produced.

19 Q. Why don't you tell me what you're calling the
20 glass in this case.

21 A. Okay.

22 Q. Just so that we can expedite, why don't you give
23 me all the color copies?

24 A. Okay. I think they're all the same. These are

2-3

1 Q. You list a group of documents that you reviewed
2 in order to give your opinion in this case, correct?

3 A. I do.

4 Q. And were those documents provided to you by
5 counsel for the plaintiff, Mr. Farrah?

6 A. They were.

7 Q. And were there any other documents that you
8 requested that you were not given at that time?

9 A. No.

10 Q. Are there any documents that you are aware of
11 that you wish you had that would have changed your opinion
12 in this case?

13 MR. FARRAH: Objection.

14 A. Documents, no.

15 Q. Is there anything other than documents you wish
16 you had at the time that you wrote this affidavit that
17 would have assisted you in your opinion in this specific
18 affidavit?

19 MR. FARRAH: Objection.

20 A. Yes.

21 Q. What?

22 A. Two things.

23 Q. Okay.

24 A. I would have liked to have had the glass in which

2-4

1 all the same. I tried to get them to print out so that
2 the glass was in the middle, but they all turned out to be
3 identical.

4 MR. GILLIS: Why don't we have this marked
5 as one exhibit.

6 (Exhibit No. 12 marked for
7 Identification).

8 Q. To your understanding, this has been represented
9 to you to be the type of glass that a straight-up Jack
10 Daniels Manhattan would go into at the Longhorn Steakhouse?

11 A. It's more than just having been represented to
12 me.

13 Q. How do you know more than having been more than
14 represented to you?

15 A. That was photographed in the Longhorn.

16 Q. By whom?

17 A. By either plaintiff's counsel or member of
18 plaintiff's counsel's team.

19 Q. Were you there?

20 A. No.

21 Q. Have you ever been to the Longhorn Steakhouse?

22 A. No.

23 Q. Ever in your life for anything?

24 A. I don't think so.

2-41

1 Q. Okay.

2 A. Let me ask you this: Where is the closest one?

3 MR. FARRAH: You can't ask the questions.

4 A. Well, I mean, I'm trying to answer the question.

5 I'm not a person who goes there --

6 Q. I'll take your word for it.

7 A. Okay. Let me just say, modify my answer or amend

8 it to say I'm not aware of being in any Longhorn

9 Steakhouse.

10 Q. Regardless, you didn't go to any Longhorn

11 Steakhouse as part of your investigation in this case?

12 A. No.

13 Q. And no one has brought you a drink from the

14 Longhorn that you could measure the alcohol, correct?

15 A. I keep waiting for that to happen, yes.

16 Q. Do you expect to do that before trial?

17 A. I have recommended that to plaintiff's counsel.

18 Q. When did you recommend that?

19 A. Because --

20 MR. FARRAH: When or why?

21 Q. When?

22 A. When? When I was first aware of the photos, I

23 said that what would really be helpful would be to have the

24 actual volume so we could measure the volume and then also

2-43

1 A. I certainly did.

2 Q. And to this date, you still haven't gotten it?

3 A. Hasn't been done, to the best of my knowledge.

4 Q. But you did have available to you the schematics

5 of the glass which showed its size, correct?

6 A. Well, I have that photo that tells me, and I can

7 juxtapose the photo of the glass against the other things

8 and get an idea of the size of the glass.

9 Q. You can't draw any conclusions from just the

10 picture, though, correct?

11 MR. FARRAH: Objection.

12 A. Well, I wouldn't say that. I can draw some

13 conclusions.

14 Q. What conclusions did you draw?

15 A. My conclusion, the major conclusion that I drew,

16 which I believe was in my Rule 26 report fairly

17 extensively, is that as that drink appears there with

18 approximately a quarter of an inch between the top of the

19 fluid and the top of the glass, that the volume in there,

20 even with the cherry, would certainly be more than the two

21 and one quarter ounces that was in the bartender's manual

22 about how to make a Jack Manhattan.

23 Q. Can you tell from this photograph whether that's

24 a half inch or a third of an inch from the top?

2-4

1 get an alcohol calculation.

2 Q. Because you lecture frequently that seeing a

3 picture of a drink is great, but it doesn't do anything as

4 far as letting you know how much alcohol is in it, correct?

5 A. My job from a scientific perspective is to

6 evaluate the volume and the content, the alcoholic content.

7 So from a scientific perspective, seeing a picture does not

8 really do it for me.

9 Q. Okay. So that's something you normally do in

10 these cases. You try get the drink so that you can

11 evaluate the alcohol content in a drink, correct?

12 A. Okay. I don't try to get them on my own. I

13 frequently recommend to whoever has retained me to try and

14 get a hold of the drink.

15 If it's a drink with ice, to try and pour

16 out the contents without the ice, and carry it out of the

17 establishment, and bring it to me so that I can analyze it

18 and measure the volume.

19 Q. I think you called before that the Old Marx

20 Brothers, put the hot water bottle in your pants?

21 A. That's my wording. I always say, put the hot

22 water bottle in your pants, just pour out and --

23 Q. And you recommended that to counsel in this case,

24 correct?

2-4

1 A. I can't tell precisely what it is, of course not.

2 Q. And because the base is smaller than the top, you

3 don't know at each ounce level how high the drink rises in

4 the glass, correct?

5 MR. FARRAH: I'm sorry. Objection.

6 A. I don't know specifically. That is, if you ask

7 me, I can put a mark on the glass, the answer is no.

8 Q. If you were to put a mark on the glass in the

9 picture marked Exhibit 12, you don't know what portion of

10 that drink, just from marking the glass, is melted ice,

11 correct?

12 A. Well, there is no ice in that drink.

13 Q. Well, in order to make it, don't you put it into

14 a shaker full of ice and then stir it around and shake it?

15 MR. FARRAH: Objection.

16 A. That would be one way to make it. You could.

17 Q. Well, what's your understanding of how the drink

18 was made in the case that you're now sitting as an expert?

19 MR. FARRAH: Objection.

20 A. Why don't we refer to the bartender's manual.

21 Why don't you pull that out which I believe was marked last

22 time and we'll get it specifically.

23 I'm not going to rely on my memory when we

24 have a document that will speak for itself.

2-45

1 Q. So as you sit here today, you don't have a
2 specific memory of how it was made, correct?
3 A. I have a vague recollection that something of
4 what you're describing --
5 Q. What is your vague recollection that it was made
6 over ice?
7 A. That the two liquors are poured into a shaker,
8 and that they're shaken up, and poured out, and ice is left
9 back.
10 Your question asked about how much of the
11 contribution of the ice would impart water to the drink.
12 Q. Yes.
13 A. Not a lot.
14 Q. What's not a lot?
15 A. Less than half an ounce, I would say.
16 Q. Okay. Two ounces of bourbon, half ounce of
17 vermouth --
18 A. Quarter.
19 Q. Sorry, quarter ounce of vermouth, and stirred,
20 shaken with ice.
21 Is it your testimony that that will not come
22 anywhere close to where this drink is in this glass marked
23 as Exhibit No. 12?
24 MR. FARRAH: Objection.

2-47

1 Q. What I meant is that five ounces is the bourbon
2 and the vermouth alone, correct?
3 MR. FARRAH: Objection.
4 A. Well, let's say that the bourbon and the vermouth
5 represents four and a half ounces, and some of the water
6 that comes off the ice when it's shaken, as you described,
7 might be another half ounce. So that would be five ounces
8 there.
9 Q. And how much further up does the cherry bring it?
10 MR. FARRAH: Objection.
11 A. The difference before what it was before then and
12 approximately that quarter inch.
13 Q. Based on the way that this glass is funneled --
14 A. Yes, it's conical shaped.
15 Q. -- conical shape, in this photograph, how many
16 ounces are unused in this glass from the point where the
17 liquid is, the top of the liquid to the top of the glass?
18 A. How many ounces?
19 Q. Yes.
20 A. I don't think I should speculate on that.
21 Q. So you can't tell?
22 A. I'm not going to speculate on that answer. I
23 would like to, and I anticipate having an opportunity to
24 actually do that exact measurement before trial, and I have

2-4

1 A. That's my belief is, yes.
2 Q. Okay. But you haven't tested it?
3 A. No.
4 Q. How much alcohol would you have to put in that
5 glass before it was filled to the very brim with the cherry
6 in it?
7 A. Well, it was represented by the bartender that
8 that's a six ounce glass.
9 Q. Correct?
10 A. And that they fill it a little bit less, and that
11 the cherry brings up the volume a little bit higher. So
12 the answer is probably that I would say if you take the
13 cherry out, there's probably at least five ounces of liquor
14 in that glass.
15 Q. To get it up to the top?
16 A. No. It's a six ounce glass.
17 Q. So you're saying you believe there's at least
18 five ounces of alcohol in that glass that's been marked as
19 Exhibit 12?
20 A. Yes, I believe it's very close to five ounces,
21 yes.
22 Q. And that's not water, that's the alcohol itself?
23 A. No, it's not the alcohol itself. That's not a
24 hundred percent alcohol.

2-4

1 the intent of trying to actually do the exact same thing in
2 the courtroom right in front of the jurors.
3 Q. But you haven't done it yet?
4 A. No.
5 Q. You signed this affidavit May 4, 2005, correct?
6 A. Yes.
7 Q. And you knew at that point that -- your practice
8 is to do this in front of the jury right in the courthouse,
9 correct?
10 MR. FARRAH: Objection.
11 A. No, it's not my practice.
12 Q. Well, you intend on doing it?
13 A. Yes. But practice would be -- practice would
14 mean that I've done it on numerous occasions and do it
15 relatively routinely, at least say 50 percent of the time.
16 Q. When did you make, when did you decide that you
17 wanted to do this in the courtroom?
18 A. I wanted to do it in the courtroom from the first
19 day I was retained on the case and learned about it.
20 Q. And you never found the time to do that before
21 you submitted your expert report November 1, 2006, correct?
22 A. No, that is not correct.
23 Q. Well, between the time you got chosen as an
24 expert in this case until the time you submitted your

2-49

1 affidavit, you didn't do it, correct?
 2 A. I didn't do it, that's correct.
 3 Q. You weren't physically unable to do it, you just
 4 didn't do it, correct?
 5 A. Well, I was physically unable to do it.
 6 Q. How is that?
 7 A. Because I did not have the things I needed to
 8 rely on. I asked, bring me a glass.
 9 Q. Other than asking for the glass, what else did
 10 you do?
 11 MR. FARRAH: Objection.
 12 A. I didn't do anything more in terms of actual
 13 experimentation because I wanted to have an actual glass.
 14 And if not an actual glass from the establishment, I wanted
 15 to have a glass that was purchased that met the
 16 characteristics that the bartender described.
 17 And that's a conical glass that would hold
 18 six ounces of liquid volume at that point in time, and it
 19 hasn't been done yet.
 20 The materials have not been brought to me,
 21 or else I would have done that study.
 22 Q. How many times have you requested the materials?
 23 A. Only once or twice.
 24 Q. Okay. You filed an affidavit under oath as to

2-51

1 Q. Is it your testimony as you sit here today that
 2 the reason you couldn't do this test is because you didn't
 3 have time to do it before your 60-J affidavit was due?
 4 A. I never said that.
 5 Q. Okay, fine. If you had any questions as to the
 6 amount of alcohol in that glass before you filed this
 7 affidavit, you had ample time to revolve those questions by
 8 doing what it is you say you now want to do in Court,
 9 correct?
 10 MR. FARRAH: Objection.
 11 Q. Go ahead. You can answer.
 12 MR. FARRAH: Well, I just want to say for
 13 the record that the affidavit is dated May 4, 2005, as I
 14 understand it, that the testimony of Kristin O'Donnell --
 15 MR. GILLIS: Well, if you're going to start
 16 testifying --
 17 MR. FARRAH: I want you to be fair to this
 18 witness. The testimony of Kristin O'Donnell about the
 19 level of the alcohol, as I recall, didn't happen until
 20 seven months later, December 28, 2005?
 21 MR. GILLIS: Correct.
 22 MR. FARRAH: Okay.
 23 Q. What prevented you other than counsel giving you
 24 the glass from doing this experimentation prior to filing

2-5

1 Mr. Southworth's intoxication in this case, correct?
 2 A. I did.
 3 MR. FARRAH: Objection.
 4 Q. And by affidavit, I'm referring here to Exhibit
 5 2, and you swore under the pains and penalties of perjury
 6 in that affidavit, correct?
 7 A. Yes, I did. I signed under pains and perjury.
 8 Q. And you stated these were your opinions to a
 9 reasonable degree of scientific certainty, correct?
 10 A. I did.
 11 Q. And if you had any question as to how much
 12 alcohol was in that drink, all you had to do was go get a
 13 glass and you could have resolved any of those questions
 14 prior to giving sworn testimony under oath to a reasonable
 15 degree of scientific certainty, correct?
 16 MR. FARRAH: Objection.
 17 A. I'm sorry. But first of all, that
 18 mischaracterizes my statements and it also mischaracterizes
 19 my intentions.
 20 Q. I didn't ask you about your intentions. I asked
 21 you, you had ample time, time wasn't a factor before you
 22 filed this 60-J affidavit, correct?
 23 MR. FARRAH: Objection.
 24 A. Time is always a factor.

2-5

1 your affidavit in conjunction with the 60-J affidavit?
 2 A. Mr. Gillis, you answered your own question in
 3 that question.
 4 Q. Just the glass?
 5 MR. FARRAH: Objection.
 6 A. You just answered. I asked for this. I said
 7 please bring me a glass. Please, as you quoted me, get the
 8 liquid, go to the establishment, pour it into a hot water
 9 bottle, take it out of there, bring it to me real quick so
 10 that I can measure the volume, we'll send it to a forensic
 11 lab, we'll get it analyzed.
 12 I can do all of that for you. My role in
 13 the case is as expert. I don't run the case. Plaintiffs'
 14 attorney runs the case.
 15 If he didn't see fit to do that, he must
 16 know what he's doing. I have to defer to him. He's the
 17 attorney. I am only a poor scientist answering questions.
 18 Q. Okay. As a poor scientist, you didn't do any
 19 independent work to get that glass other than to ask your
 20 counsel, correct?
 21 A. That is not my role when I'm retained in the
 22 case.
 23 Q. Is that a yes or no?
 24 A. The answer is what it is. The answer is what it

2-53

1 is. It is not my role.
2 Q. Other than asking him to get the glass, did you
3 do anything else to obtain the glass in this case, "him"
4 being Mr. Farrah?
5 A. What was the last part of that question?
6 Q. Other than asking Mr. Farrah to get you the
7 glass, did you do anything else independently to get that
8 glass on your own?
9 A. No. That's not my role.
10 Q. Okay, that's all. The exhibit here that's been
11 marked, when did you first see this photograph?
12 A. A long time ago.
13 Q. More than a year?
14 A. It may have been. I cannot give you a date on
15 it because I didn't take the photos, but I know the photos
16 were e-mailed to me by plaintiff's counsel when they were
17 obtained, and it was quite a while ago.
18 Q. Was it before you filed this affidavit?
19 A. I wish I could tell you, but I really cannot.
20 Q. Okay. Anything else you wished you had before
21 you made your opinion in the affidavit that's been marked
22 Exhibit 2?
23 A. I wish that I had a more accurate description of
24 how that drink was made rather than the description that

2-55

1 Thomas Espey, correct?
2 A. That would be Thomas Espey --
3 Q. -- that went to the bar with Southworth and
4 Connelly?
5 A. Yes, I believe so.
6 Q. And his brother Michael and some friends joined
7 them at the table, correct?
8 A. Yes, sir.
9 Q. In Paragraph 20, you put together a chronology,
10 correct, as to when food and alcohol was arrived, correct?
11 A. I did.
12 Q. And are these times the times to the best of
13 your -- to a scientific certainty that you believe based on
14 all the evidence that you looked at that these events
15 occurred?
16 MR. FARRAH: Objection.
17 A. Yes, it was based on all the events. And where I
18 couldn't find specific notations either on the bar tab or
19 the -- what did we call it, the audit?
20 Q. Audit?
21 A. -- audit report, I tried to space out the drinks
22 so that there was reasonable distance among them,
23 reasonable time among them.
24 Q. Okay. And so in Paragraph 18, you have him, you

2-5

1 just said there were two ounces of Jack bourbon and a
2 quarter ounce of sweet vermouth because I never believe
3 that to be a true representation of the recipe or formula
4 for that drink.
5 Q. Now, based on what you did review, you came up
6 with -- well, look at Paragraph 20 of that affidavit?
7 A. Paragraph 20?
8 Q. Paragraph 20, yes, on Page 6.
9 MR. FARRAH: Of the affidavit?
10 MR. GILLIS: 60-J.
11 MR. FARRAH: Paragraph 20?
12 MR. GILLIS: On Page 6.
13 MR. FARRAH: Oh, okay.
14 Q. Let's go back just one step. You wrote in
15 Paragraph 17 that Southworth, Connelly and Espey were
16 joined by three or four others for dinner including Espey's
17 brother Michael Espey, correct?
18 A. Yes.
19 Q. It's your understanding that Michael Espey just
20 showed up for the dinner, not for the predinner activities
21 at the bar that evening, correct?
22 A. I know one of the Espeys was at the bar and one
23 was not.
24 Q. Okay. Going back to Paragraph 15, that would be

2-5

1 have Southworth having 4 24-ounce beers with his meal, and
2 at least two Jack Daniels, is that correct?
3 MR. FARRAH: Objection.
4 A. Yes, sir. Four 24-ounce beers and at least two
5 Jack Manhattans.
6 Q. Is that a conclusion you drew in this case?
7 MR. FARRAH: Objection.
8 A. I don't know if it's a conclusion, but it's based
9 on a statement from Jude Connelly in his deposition, Page
10 38. And it's also based in part on the witness statement
11 from waitress Lee Chabot.
12 Q. And again, you knew that from looking at all the
13 evidence including the audit report that he couldn't have
14 had four beers at the table because only two were served to
15 the entire group, correct?
16 MR. FARRAH: Objection.
17 A. I knew no such thing.
18 Q. You didn't know that?
19 MR. FARRAH: Objection.
20 A. I knew no such thing.
21 Q. Okay. You had the audit report, correct?
22 A. I did.
23 Q. Did you review it?
24 A. Certainly.

2-57

1 Q. Didn't that seem odd to you that there's only two
2 beers served at the whole table, and you give four of them
3 to Southworth at the table?

4 MR. FARRAH: Objection.

5 A. Sometimes people go up to the bar and order a
6 drink when it takes too long to get served from the table.

7 Q. What evidence do you have that that happened on
8 this evening?

9 A. I personally do not have any evidence, but I was
10 asked to assume that that was the number of beers that was
11 used. Moreover, that those numbers are consistent with
12 the testimony that are here.

13 To Jude Connelly, question, Page 38, Line
14 10, How many beers to the best memory did you see him drink
15 at that table? Answer: Maybe four, maybe.

16 Q. And you ignored his subsequent testimony where he
17 changed that, correct?

18 MR. FARRAH: Objection.

19 A. Well, I used that statement.

20 Q. As you sit here today, have you looked at the
21 audit report having had all the depositions and now having
22 discussed the reports given to the district attorney's
23 office and the grand jury and so forth, what is your
24 opinion as to how many beers Mr. Southworth was served

1 while he was sitting at the dinner table on January 26,
2 2003?

3 MR. FARRAH: Objection.

4 Q. Excuse me. September 26, 2003?

5 MR. FARRAH: Objection. I'm not objecting
6 about the date. Objection. What's his opinion, is that
7 your question?

8 MR. GILLIS: Yes.

9 MR. FARRAH: Objection.

10 A. My role in this case was really not to form an
11 opinion about how many drinks of which type was served.

12 My role was to review the documents and then
13 to take the assumption that I was, that was put to me by
14 plaintiff's counsel, and to put that into the Widmark
15 formula, and come out with numbers, and that is what I did.

16 I did not form an independent opinion on the
17 number of drinks, although I was guided -- we went through
18 this last time, Mr. Gillis.

19 I was guided by the testimony, the witness
20 statements and the audit report. And where I found an
21 inconsistency, I asked plaintiff's counsel what do you want
22 me to assume for the purposes of writing this document, and
23 I was told what to assume.

24 Q. Was that one of those inconsistencies that you

2-59

1 were told to assume, four beers at the table?

2 MR. FARRAH: Objection.

3 A. Well, it's not an inconsistency. If it's
4 consistent with one statement and then there's another
5 statement that contradicts is, it's going to be consistent
6 with one and inconsistent with another, and that's a job I
7 believe for the jury to decide.

8 Q. You don't think four drinks at the table is
9 inconsistent with the facts in this case based on the audit
10 report and everything else you reviewed?

11 MR. FARRAH: Objection.

12 A. I think I just answered that.

13 Q. Who told you -- it was Mr. Farrah who told you to
14 assume four beers at the table, is that correct?

15 A. Yes, sir.

16 MR. FARRAH: Objection. He just testified
17 it's in the evidence.

18 A. That's right.

19 MR. GILLIS: No. He testified earlier he
20 assumed it based on what you told him and that there's some
21 evidence either way, one that there were only two drinks at
22 the table, one that there were four, and to correct the
23 inconsistencies, he asked you.

24 MR. FARRAH: That isn't what he testified

2-6

1 to.

2 A. No. That isn't what I testified to. You
3 mischaracterize my testimony.

4 I read into the record the statements that
5 said that he had four beers at the table. And you --

6 Q. Why didn't you read into the record --

7 MR. FARRAH: Why don't you let him finish
8 his answer?

9 Q. Why didn't you read into the record that there
10 were only two drinks served at the table according to the
11 audit report?

12 MR. FARRAH: Objection.

13 A. You never asked me to read that in.

14 Q. So you only read into -- in your report, you
15 don't put that there were only two beers in the audit
16 report, correct?

17 MR. FARRAH: Objection. Of course he does.
18 He recites what the audit report says right in his -- in
19 Paragraph 20 is the audit report, or at least it sets out
20 the audit report. Please.

21 Can we have a break for some water?

22 MR. GILLIS: Sure.

23 VIDEO OPERATOR: The time is now 3:32 p.m.
24 and we're now off the record.

2-61

1 VIDEO OPERATOR: The time is 3:41 p.m.
 2 We're now back on the record.
 3 Q. Doctor Benjamin, as one of those four beers, did
 4 you determine whether or not one of them was a beer that
 5 Mr. Southworth had ordered at the bar but brought to the
 6 table?
 7 MR. FARRAH: Objection.
 8 A. Did I determine?
 9 Q. Yes.
 10 A. What do you mean by determine?
 11 Q. Well, you have in your testimony that he had four
 12 beers at the table that evening, correct?
 13 A. Right.
 14 Q. Was one of them a beer that he brought to the
 15 table from the bar when his table was ready for them to be
 16 seated?
 17 MR. FARRAH: Objection.
 18 A. No. My interpretation is that the two beers
 19 that were imbibed prior to being seated were consumed, and
 20 then additional beers -- as a matter of fact, I believe
 21 that's what Ms. Chabot says.
 22 Q. Well, did you read her deposition when she said
 23 the three people that were at the bar brought their drinks
 24 to the table?

2-63

1 Q. Okay. And you have no evidence of anything
 2 being brought to the table that night other than what was
 3 put in the computer, correct?
 4 MR. FARRAH: Objection.
 5 A. Just the numbers of the beers.
 6 Q. And those were what you were asked to assume by
 7 Mr. Farrah, correct?
 8 MR. FARRAH: Objection.
 9 A. That's correct.
 10 Q. Paragraph 24, we went over this in some length in
 11 the first part of the deposition, but you don't have any
 12 specific testimony that you can point to like Jude
 13 Connolly's deposition that you've been referring to
 14 frequently, that says that they left at approximately ten,
 15 ten p.m., correct?
 16 MR. FARRAH: Right now as he sits here?
 17 MR. GILLIS: Yes.
 18 A. Well, I don't have anything in front of me, no.
 19 Q. In fact, last time we talked at length about Jude
 20 Connolly's deposition that says they left around eleven
 21 o'clock, is that correct?
 22 MR. FARRAH: Objection.
 23 Q. I know you don't agree with that but that's what
 24 it says, correct?

2-6

1 MR. FARRAH: Objection.
 2 Q. Not her statement, but her deposition.
 3 MR. FARRAH: Did you read her deposition?
 4 A. I did read her deposition at some point this
 5 time, sure.
 6 Q. When was that?
 7 A. I beg your pardon?
 8 Q. When did you read her deposition?
 9 A. I can't tell you. I don't know when.
 10 Q. You haven't listed it in any of the documents
 11 that you based your opinion on, have you?
 12 A. I may stand corrected.
 13 Q. Okay. Wouldn't that be important in rendering
 14 your opinion to know that they actually brought drinks over
 15 from the bar?
 16 MR. FARRAH: Objection.
 17 A. I don't think that that statement is any more or
 18 less important than the witness statement, either.
 19 Q. Wouldn't you find the audit record more credible
 20 given the fact it was a computer printout of what was
 21 actually served to the table that night?
 22 MR. FARRAH: Objection.
 23 A. Well, what was on the audit report is what she
 24 personally received as an order and put in.

2-6

1 A. If that's what it says, that's what it says.
 2 Q. If that's what it says, you don't agree with Jude
 3 Connolly on that point, correct?
 4 A. That is correct.
 5 Q. And you say it's about ten minutes from drive
 6 from there to the hotel, is that correct?
 7 MR. FARRAH: I'm sorry. Can you just tell
 8 me what --
 9 MR. GILLIS: Paragraph 24, fourth line, the
 10 drive to the hotel took approximately 10 to 15 minutes.
 11 Q. Did I read that correctly?
 12 A. Yes, you did.
 13 Q. Okay. Do you have any evidence from any source
 14 that you're aware of that Mr. Southworth was showing signs
 15 of intoxication from the time he left the table to Longhorn
 16 until he got out of the door of the Longhorn?
 17 A. Do I have any evidence, is that what you asked
 18 me?
 19 Q. Yes.
 20 A. Yes, I do.
 21 Q. What's that?
 22 A. I have the graphs that I compiled that show that
 23 his blood alcohol was increasing and increasing and
 24 increasing.

2-65

1 Q. Other than that, you don't have anybody stating
2 he was walking in an odd way or anything like that to the
3 door, correct?

4 MR. FARRAH: Objection.

5 A. I am not aware of any testimony to that effect.

6 Q. Other than your Widmark testing, that's what
7 you're basing that on, correct?

8 A. Well, there was an automobile accident as well.

9 Q. I'm just talking about this time period which is
10 two hours before the accident?

11 A. Okay.

12 Q. What do you have other than your Widmark that
13 shows that he may have been showing signs of intoxication
14 from the time he got up from the table to leave and when he
15 actually left the restaurant that night?

16 A. Well, I think that question is a little unfair.

17 Q. I'm just asking you, tell me what it is other
18 than the graph, if you have anything. If you don't, you
19 don't.

20 MR. FARRAH: Objection.

21 A. Well, I'm saying when you say other than the
22 graph what do you have, I think that's an unfair question.

23 Q. Well, I disagree with you, so just answer the
24 question. I know you have your graph?

2-67

1 I'm trying to get the universe of
2 information from which you would render an opinion. So I
3 don't think that's unfair.

4 Now, having said that, at the hotel, other
5 than your Widmark information -- and you've made it clear
6 what you think of that, and I agree with you -- is there
7 anything else that you would rely upon to give testimony in
8 this case that would show he was visibly intoxicated in the
9 hotel when he left, after he left the restaurant that
10 evening?

11 A. I don't know or I can't cite any specific
12 testimony to that effect.

13 Q. Okay. So you're basing that on your Widmark
14 calculations, correct?

15 A. Yes, sir.

16 Q. Fine. From the hotel to the other side, the
17 Gentlemen's Club that they went to next, other than your
18 Widmark formula, are you aware of any other evidence that
19 you would be relying upon to prove, to show that Mr.
20 Southworth was visibly intoxicated at that time period from
21 the hotel to the Gentlemen's Club?

22 A. Once again, I can't cite any testimony for you.

23 Q. Fine. While they were sitting in the parking
24 lot at the Gentlemen's Club, are you aware of any

2-6

1 A. Yes.

2 Q. I'm trying to get the universe of things that you
3 might base an opinion on.

4 What other than your graph would you base an
5 opinion that he was not carrying himself normally from the
6 table to the door, plain and simple?

7 MR. FARRAH: Objection.

8 A. I have no statements that I can refer to for you.

9 Q. Thank you. What evidence do you have that he
10 was showing visible signs of intoxication at the hotel that
11 they went to directly from the Longhorn?

12 MR. FARRAH: Objection.

13 A. I would have to once again refer to my
14 calculations.

15 Q. Other than your calculations, are you aware of
16 any evidence, testimony or otherwise, that would indicate
17 to you that he was showing visible signs of intoxication at
18 the hotel?

19 A. Once again, I think that that is an unfair
20 question.

21 Q. I understand you feel that way. But I'm just
22 trying to narrow down so something doesn't pop up at trial,
23 there were four or five other things I saw in addition to
24 my graph.

2-6

1 information or evidence other than your Widmark
2 calculations that you would be using to rely, to make an
3 opinion as to whether or not Mr. Southworth was visibly
4 intoxicated during that time period?

5 A. No.

6 Q. Okay. From the parking lot back to getting Mr.
7 Espey's pickup truck, are you aware of any evidence other
8 than your Widmark calculations that would lead you to
9 believe that Mr. Southworth was visibly intoxicated during
10 that time period?

11 A. Other than the Widmark calculation?

12 Q. Correct.

13 A. No.

14 Q. Okay. From leaving the parking lot of the
15 apartment up to but not including the accident, are you
16 aware of any evidence that, other than your Widmark
17 calculations that Mr. Southworth was showing visible signs
18 of intoxication during that time period?

19 A. I think before I would answer, I would want to
20 see the police report.

21 Q. And for what purpose, for speed?

22 A. Well, to see what --

23 MR. FARRAH: Objection.

24 A. To see what kind of descriptions were in the

2-69

1 police report or if other witnesses made descriptions or
 2 the police officers recorded information about observers
 3 who saw him driving prior to the impact and so forth.
 4 Q. I'm going to ask you to assume -- and we'll break
 5 that time period down just to be fair to you -- that Mr.
 6 Southworth left the apartment building and was heading
 7 North on his way to New Hampshire when he received a phone
 8 call that he had his friend's keys and he had to turn
 9 around and come back, okay?
 10 A. Okay.
 11 Q. And I want you to assume that up to that point
 12 before he turned around, there's no mention of the way he
 13 was driving before he turned?
 14 A. No mention by whom?
 15 Q. In the police report about how he was driving
 16 before he turned around.
 17 A. All right.
 18 Q. With that assumption, what are you aware of for
 19 evidence other than your Widmark calculations that Mr.
 20 Southworth was driving, was visibly intoxicated from the
 21 time he left the apartment building until the time he
 22 turned around to come back towards where he had left his
 23 friends previously?
 24 A. Well, when you ask me to assume that, you more or

2-71

1 all?
 2 A. Have I tested it, no.
 3 Q. When you said you reviewed it, you reviewed the
 4 findings of it, correct?
 5 A. Yes, sir.
 6 Q. And when did you do that?
 7 A. Within the last six to twelve months.
 8 Q. Okay. And the sample noted no alcohol in it,
 9 correct?
 10 A. Yes.
 11 Q. And that was at one o'clock, correct?
 12 A. One p.m.
 13 MR. FARRAH: Objection.
 14 Q. One p.m., correct?
 15 A. Yes.
 16 Q. Now, getting into your methodology here, for
 17 purposes of this opinion that you gave in this case --
 18 strike that. Let's just go right to your opinion.
 19 MR. FARRAH: This is Exhibit 2 still, is
 20 that right?
 21 MR. GILLIS: Yes, starting on Page 10.
 22 Q. You say in that, you come up with a couple of
 23 different conclusions in this case as to what his blood
 24 alcohol could be, correct?

2-7

1 less back me into a corner of answering that I have no
 2 other information.
 3 Q. Well, let's put it a different way. If there's
 4 nothing in the police report that talks about him on his
 5 way back to New Hampshire but it only talks about him as
 6 he's approaching the accident scene, you'd agree you have
 7 no other evidence other than the Widmark, correct?
 8 MR. FARRAH: Objection.
 9 A. That I know of no other transcribed or
 10 memorialized statements that would bolster that opinion.
 11 Q. Okay. Now, you then get into, you start
 12 numbering your paragraphs No. 1 again on Page 1.
 13 Well, before I get to the method, let's go
 14 back to the last three paragraphs on the top of Page 9,
 15 Paragraphs 28, 29, 30.
 16 It's your understanding that a blood sample
 17 was secured at one p.m., correct?
 18 A. Yes.
 19 Q. Have you ever reviewed that blood sample?
 20 A. I know what the blood sample showed.
 21 Q. That wasn't the question. Have you reviewed the
 22 blood sample yourself?
 23 A. What is reviewed the blood sample mean?
 24 Q. Have you actually tested that blood sample at

2-7

1 MR. FARRAH: Objection.
 2 A. Well, you'll have to be more specific than that.
 3 I'm sorry.
 4 Q. What based on your opinion do you find to be Mr.
 5 Southworth's blood alcohol at the time he was served his
 6 last drink at the Longhorn Steakhouse that evening?
 7 A. Based on?
 8 MR. FARRAH: In the 60-J?
 9 Q. In the 60-J. All of this is document No. 2
 10 here, Exhibit No. 2, I'm sorry.
 11 A. Could you repeat the question, please?
 12 (Last question read).
 13 MR. FARRAH: Do you want to point him to
 14 where in the affidavit he says that, and give him a chance
 15 to read it?
 16 MR. GILLIS: I believe it's on the top of
 17 Page 15.
 18 MR. FARRAH: Well, maybe we should start on
 19 the bottom of Page 10, based on the consumption, Paragraph
 20 3.
 21 A. Okay. Well, Item 3 on Page 10 is a good place
 22 to start. And Paragraph 3 says that at 9:30, assuming
 23 four beers were consumed, the blood alcohol would be .22
 24 percent.

2-73

1 Q. So it's your opinion that he had a .22 at 9:30
2 that evening at the Longhorn?
3 MR. FARRAH: Objection.
4 A. Based on, based on the four beers added to the
5 other two Manhattans.
6 Q. And that was an assumption you were asked to make
7 by Mr. Farrah, correct?
8 MR. FARRAH: Objection.
9 A. Yes.
10 Q. If he had only consumed two beers at the table,
11 that would be down to a .18, correct?
12 A. .18 is correct.
13 Q. How did you come up with these calculations?
14 MR. FARRAH: Objection to the form.
15 A. They're right off the same Widmark formula and
16 the printout that I gave you last time.
17 Q. Is there a reason why in this case in this
18 affidavit here you give a range from a .18 to a .22, but in
19 your submission pursuant to Rule 26, you give a specific
20 amount at a particular time?
21 A. Because as I told you during our last portion of
22 the deposition, there was some question as to the number of
23 drinks that were consumed, and I was asked to assume
24 different hypotheticals, and each hypothetical was a

1 different calculation, and I crunched the numbers through
2 the formula and reported the result.
3 Q. Okay. The first assumption was the four drinks
4 at the table, four double beers at the table, correct?
5 A. Yes.
6 Q. Plus two double beers at the bar before they got
7 to the table, correct?
8 A. Yes.
9 Q. Plus a beer after dirt biking, correct?
10 A. Yes.
11 Q. And how many Manhattans prior to 9:30 in that
12 assumption?
13 A. Well, I don't have the source document with me.
14 Do you have it? You have the exhibits from the last
15 deposition.
16 Q. Well, the last deposition, the source documents
17 you gave us were for your Rule 26. You didn't give us the
18 source documents for your 60-J affidavit.
19 A. You never got the Widmark charts that went with
20 the affidavit?
21 Q. Not unless they've come within the last week, no.
22 A. Okay. I'm as surprised as you are.
23 Q. Was that something that you originally attached
24 to your affidavit?

2-75

1 A. I made them -- I sent them all to plaintiff's
2 counsel. What he forwarded to you was his determination.
3 Q. Okay. And that was obviously done prior to May
4 4, 2005 when you signed this, correct?
5 A. I've sent him before I signed this, of course,
6 yes.
7 Q. What did you use for Widmark R in those
8 calculations.
9 A. I don't recall. That's why I asked for a
10 replica of it so I could be able to recount that for you.
11 MR. FARRAH: It's attached right here to
12 Exhibit 9.
13 MR. GILLIS: Exhibit 9 is the letter that
14 you faxed to us a week ago, correct? Mr. Farrah, is that
15 your fax, Exhibit 9?
16 MR. FARRAH: Yes, that's right.
17 Q. I'm not going to get into new stuff here. But
18 assuming we've never seen this before this past week, I
19 want you to take a look at this, the last page and what Mr.
20 Farrah is saying your Widmark calculations for your 60-J,
21 your affidavit in conjunction with the 60-J information.
22 A. Is there a question there, Mr. Gillis?
23 Q. Yes. Is that what you're referring to as your
24 Widmark calculation for your affidavit related to the 60-J

1 submission?
2 A. I think it is.
3 Q. Okay. Why don't you take a minute and make sure
4 it is before we make a copy of it and use it for purposes
5 of your 60-J.
6 MR. GILLIS: Is there a particular reason
7 why we didn't get this until a week ago if you had it as
8 part of his 60-J?
9 MR. FARRAH: I don't think it was referenced
10 in the 60-J, Mike. Like I said, you've had the 60-J since
11 May of 2005.
12 If it weren't referenced in it, is there any
13 particular reason why you didn't ask for it?
14 MR. GILLIS: It's part of your required
15 disclosure.
16 MR. FARRAH: Well, if it is and we didn't
17 disclose it, I apologize.
18 MR. GILLIS: It's the photographs of
19 Southworth, then it's the photographs of the drinks, and
20 it's the copies of this.
21 MR. FARRAH: You can pontificate all you
22 want.
23 MR. GILLIS: Is there anything else we don't
24 have that you're going to give to us in dribs and drabs

2-77

1 after the fact?

2 MR. FARRAH: The same question might be

3 asked of you.

4 MR. GILLIS: What are you missing that we

5 haven't gotten to you?

6 MR. FARRAH: You haven't given anything. I

7 haven't seen a photograph from you.

8 MR. GILLIS: We haven't taken any. You've

9 got everything.

10 MR. FARRAH: Fine.

11 Q. Doctor Benjamin, have you had an opportunity to

12 review that?

13 A. I have.

14 Q. Is that your Widmark calculation for your

15 affidavit in conjunction with the 60-J submission?

16 MR. FARRAH: Objection. In conjunction

17 with? I object to that.

18 A. It does appear to be what I used for the 60-J

19 data.

20 Q. Okay. And Neil just came back with a copy.

21 Let's make that the next exhibit.

22 Just to be sure before we make it an

23 exhibit, that was submitted to counsel for the plaintiff

24 along with or prior to your affidavit pursuant to the 60-J

2-79

1 exactly what it is because it goes up higher.

2 Q. For purposes of the record, you're referring to

3 Exhibit 11, correct?

4 A. Right. To Exhibit 11, the top portion, the top

5 half of the page which if it's turned horizontally, shows

6 that it goes up to about .28 whereas this also goes to .20.

7 This just cannot print any higher in that

8 particular graph.

9 Q. Do you have an opinion as to how high his blood

10 alcohol could have gone that evening and still have with a

11 burn-off rate of .02 and still have a zero -- excuse me --

12 blood test next day at one p.m.?

13 A. I think we can start to address that because you

14 can see the table starts to come down about three a.m. in

15 the morning.

16 But the answer is if we were to go backwards

17 from one p.m. to one a.m. which is twelve hours and use a

18 burn-off rate of .02, you could have a .24 blood alcohol at

19 one a.m. and be zero at one p.m.

20 So anything under .24 would show up as a

21 zero at one p.m. the next day.

22 Q. Okay. So according to this chart, it stops at

23 .2, but we know it's going up higher, correct?

24 A. Yes, sir.

2-7

1 materials, correct?

2 A. Yes. I mean, I couldn't write the affidavit

3 without having generated the graft first.

4 MR. GILLIS: Can we have that marked as an

5 exhibit, please.

6 (Exhibit No. 13 marked for

7 Identification).

8 Q. Now, on this particular calculation, Widmark R

9 .68, correct?

10 A. Yes.

11 Q. And that is what is used for the average male,

12 correct?

13 A. Yes.

14 Q. And you used the Widmark data of a .2, correct?

15 A. .02, yes.

16 Q. And that concerns the burn-off rate, correct?

17 A. Yes, it does.

18 Q. Now, doctor, this seems to be like a flatness on

19 the top of this graft. Did his blood alcohol rise any

20 higher than that or is that what you call the plateau?

21 A. No. It's off the chart. It doesn't read any

22 higher than that and just gives you a straight line.

23 When you do the integration of it, which is

24 what this is that we had previously, then you can see

2-8

1 Q. But it would have to be no higher than .24 at one

2 a.m. in order to get a zero blood test at one p.m. the

3 following day?

4 A. If his burn-off rate was indeed .02.

5 Q. Okay. Well, that's what you assigned to him in

6 this case, correct?

7 A. I used, in this particular situation, default

8 numbers, .68 for the R, and .02 for the beta, which is a

9 number that you know that I've used in the past for people

10 who are frequent drinkers.

11 So I put in what I thought were fair, and

12 there's another word that they use -- like default numbers,

13 standard numbers.

14 Q. That's not just for the average person, though.

15 That's the number you normally use for a tolerant drinker,

16 correct?

17 MR. FARRAH: Objection.

18 A. Yes, at least .02 for a tolerant drinker, yes.

19 Q. When you say .02, if you felt that it should have

20 been higher, you would have used a higher number, correct?

21 A. Well, I mean, it's interesting the way you phrase

22 the question, if I felt. Feel is a difficult word to

23 interpret in a scientific setting.

24 Q. Let me rephrase the question then. You

2-81

1 determined to a reasonable degree of scientific certainty
2 that the appropriate beta for purpose of your calculations
3 in coming up with the blood alcohol, the BAC of Mr.
4 Southworth as set forth with Exhibit 13, the most accurate
5 number that you decided to a reasonable degree of
6 scientific certainty is a Widmark beta of .02, correct?

7 A. I'd have to correct that. It's not the most
8 accurate. The most accurate would be to know exactly what
9 his burn-off was.

10 This is a reasonable number to use as an
11 initial calculation.

12 Q. Okay. Not knowing what his actual burn-off rate
13 is, this is as accurate as you can get, is that fair to
14 say?

15 A. No, it's not as accurate as you can get, but it's
16 a reasonable starting point.

17 Q. How could you become more accurate without
18 knowing his exact burn-off rate?

19 A. By doing just exactly what you have in mind for
20 your next two or three questions.

21 By finding out when he was zero, and then
22 extrapolating back to the last time that he had a value,
23 and taking those hours and figuring out how much he burned
24 off.

2-83

1 reasonably certain in this case than the .02 beta?

2 A. Well, if I went back and crunch those numbers --
3 well, still, we still don't know at what time he became
4 zero, whether it was one p.m., whether it was 12:30, twelve
5 noon. So this stands as a reasonable number.

6 Is it the absolute most accurate? Of
7 course not. It's a reasonable number, though.

8 Q. And if he was at zero earlier, then that would
9 reduce the maximum that he could have been twelve hours
10 previously, correct --

11 MR. FARRAH: Objection.

12 Q. -- or eleven hours?

13 A. Well, without knowing what his burn-off rate, if
14 his burn-off rate was higher, he would get lower sooner
15 even if he was higher.

16 Q. This is the same burn-off rate you used in the
17 rule 26 admission?

18 A. In the second report, it is indeed.

19 Q. And based on this report, you opine that he was a
20 -- Paragraph 2 of your opinions, he's not obese, is that
21 correct?

22 A. Did I say that? Are you quoting me from
23 somewhere?

24 Q. Yes.

2-8

1 The fact that he was zero at one p.m. though
2 doesn't mean that he wasn't zero at twelve noon or eleven,
3 either.

4 It only means we have one point in time
5 which is certainly not the greatest piece of scientific
6 datum.

7 Q. Okay. Because, as we discussed last time, we
8 don't have two readings so we can, to accurately determine
9 his actual burn-off rate like you did in the Albert case --

10 A. Like I did in the Albert case, by subtracting the
11 two and dividing by the time interval.

12 Q. We don't have that in this case, correct?

13 A. We don't, no.

14 Q. The only way you can do it is based on your
15 training and experience to use the numbers that you feel
16 are the most accurate under these circumstances, correct?

17 A. Well, once again, I have a problem with the "most
18 accurate." I am not charged with using the most accurate.

19 I am charged with doing one that is a
20 reasonable, reasonable certainty, that it's reasonable to
21 do that.

22 I've used reasonable care in selecting that
23 number.

24 Q. Are you aware of any other number that is more

2-8

1 A. Let me see.

2 Q. Paragraph 2. Read the first sentence there.

3 A. Okay. This is for the affidavit, and this is
4 prior to my having seen this photo. Remember I asked you
5 about photos last time?

6 Q. We'll get to that in a second, but I just want
7 you to answer one question at a time.

8 A. All right.

9 Q. As of May 5, 2005, you used a Widmark R of .68,
10 correct?

11 A. I did.

12 Q. Okay. And you used that based on your opinion
13 that -- and if I read this incorrectly, let me know.

14 Assume that Jeff Southworth weighed 210
15 pounds and assumed 25 ounce Bud Lite, beer containing 30
16 grams of ethanol, that he was not obese, and that his
17 height of six four was a reasonable proportion to his
18 weight, I conclude that each 25 ounce beer consumed on an
19 empty stomach produced a blood alcohol concentration of
20 approximately .016 percent, correct?

21 A. Based on those assumptions, that's what I
22 calculate.

23 Q. Okay. Did you have any photographs of Mr.
24 Southworth at that point in time?

2-85

1 A. No.

2 Q. Were you provided, did you ask for any

3 photographs of him at that time?

4 A. I didn't know that they existed, so I didn't ask.

5 Q. Well, did you ask for any police reports?

6 A. I did ask for the police report.

7 Q. And you know that the photographs you have come

8 from the police report, correct?

9 MR. FARRAH: Objection.

10 A. I know they came from the police department. You

11 say police reports.

12 These were taken in the police station and

13 the police report may be just by the arresting officer, not

14 by the booking officer.

15 Q. And I'm sorry, when were those pictures provided

16 to you?

17 MR. FARRAH: Which pictures are we talking

18 about?

19 MR. GILLIS: Of Mr. Southworth.

20 MR. FARRAH: Do you want to mark it as an

21 exhibit?

22 MR. GILLIS: They were marked last time, I

23 believe.

24 MR. FARRAH: This was marked last time.

2-87

1 A. I can't give you a date, but it was after the

2 affidavit was filed and before I did the Rule 26 report.

3 Q. Did you think it was important for filing your

4 affidavit that you used the right Widmark R?

5 A. Of course.

6 Q. Did you request photographs of him so you could

7 determine that before you chose a Widmark R in your

8 affidavit which is marked as Exhibit 2?

9 A. At the time of the affidavit, I hadn't, I wasn't

10 aware that those photos existed.

11 Q. Did you request any photographs of him so you

12 could make a determination as to whether he was obese, not

13 obese, or otherwise?

14 A. Well, if I didn't know that they existed, I

15 couldn't request them.

16 Q. That wasn't the question. Did you ask for any

17 photographs of him so you could see what he looked like?

18 A. I did at some point in time which is how I came

19 to receive the photos.

20 Q. Did you do it prior to filing Exhibit 2, the 60-J

21 affidavit?

22 A. No. That's what I just said a moment ago.

23 Q. At any time prior to your 60-J affidavit, did you

24 request photographs of him?

2-8

1 MR. GILLIS: Okay. Well, let's mark the

2 new pictures here.

3 MR. FARRAH: And when I referred to "this,"

4 I was referring to Exhibit 6, which is Exhibit 10 to the

5 O'Donnell deposition.

6 Q. Just so we're clear here, since two weeks ago,

7 you have not produced another photograph of Mr. Southworth

8 that you had prior to your making your Rule 26 opinion in

9 this case, correct?

10 A. Not really.

11 Q. Well, when did you get these photographs?

12 A. I had those photographs previously because I

13 asked you about them at the first time we were here for

14 this deposition.

15 And you asked me, is this the photo that you

16 saw, and I just said no.

17 Q. Okay. And the photo that you had seen before is

18 the ones that we're about to mark, correct?

19 A. Yes.

20 MR. GILLIS: Let's mark that as Exhibit 14,

21 14 and 15.

22 (Exhibit Nos. 14,15 marked

23 for Identification).

24 Q. When were these produced to you?

2-8

1 A. I don't think so.

2 Q. Okay. Why not?

3 A. I don't know.

4 Q. Now, what type of signs would you expect Mr.

5 Southworth to be exhibiting if he is at .2 or above while

6 at the Longhorn Steakhouse on September 26, 2003?

7 MR. FARRAH: Objection.

8 A. Well, I think that each person handles or holds

9 their liquor in a different way and compensates and

10 manifests signs differently.

11 So I think that it's, a side from making

12 general statements, I don't think that I have anything

13 other than to say other than what Jude Connelly said.

14 VIDEO OPERATOR: Excuse me, counsel. We

15 have under five minutes remaining.

16 Q. Well, you lecture extensively that at certain

17 BACs, people show certain signs, correct?

18 A. Well, what I do is I quote the literature and

19 talk about the table that's in the, published in the AMA

20 alcohol and impaired drivers with 6500 people in it.

21 Q. And what are the public signs that you would

22 expect people to show at .2?

23 A. Well, that particular table just refers to

24 visible signs of intoxication.

2-89

1 But in general, you would be looking for
2 things like slurred speech and lack of coordination,
3 stumbling. See, the problem is they manifest themselves
4 differently and experienced drinkers can mask some of it.

5 So loudness is one of the things that was
6 already occurring in the Longhorn, and --

7 Q. I just want to interrupt you for a second because
8 I want you to not start mixing what happened at Longhorn
9 and what didn't.

10 I want you to tell me based on the
11 literature what you expect to see in most subjects at a .2,
12 what visible signs, like you were mentioning muscle
13 coordination, large muscle groups versus small muscle
14 groups.

15 MR. FARRAH: Objection.

16 Q. Give us the literature.

17 MR. FARRAH: Objection.

18 A. You said what I would expect to see in most
19 subjects?

20 Q. Yes.

21 A. You'd have to describe that individual's
22 experience with liquor for me so that, because most
23 subjects, that table that I'm referring to is in
24 nontolerant individuals, and Mr. Southworth obviously was a

2-91

1 don't want to know what the signs are that you'd expect to
2 see before .2.

3 What specific signs would you expect to
4 start seeing at .2, nontolerant?

5 A. For a nontolerant at .2 --

6 VIDEO OPERATOR: The time is now 4:24 p.m.,
7 and we're now off the record.

8 (Discussion off the record).

9 VIDEO OPERATOR: The time is 4:33 p.m., and
10 we're now on the record.

11 Q. Doctor Benjamin, just before we went off to
12 change the tape, I was asking you a question, and I'll just
13 try to repeat it.

14 What signs would you expect to see in a
15 nontolerant drinker at .2 and above? I know there are
16 some signs below .2, but I'm just looking at that point,
17 what would you expect to start seeing?

18 A. Probably a good deal of lack of coordination and
19 psychomotor coordination.

20 Q. Can you give an example of what lack of
21 coordination you're talking about? Are we talking about
22 falling down?

23 A. They might. But I'm thinking more of certainly
24 maybe, certainly wouldn't be able to thread a needle or

2-9

1 tolerant individual.

2 So when you say most individuals, you have
3 to define that for me a little bit better so I can answer
4 that question.

5 Q. Let's start with nontolerant people because
6 that's what the literature shows. What would you expect
7 nontolerant individuals to show at .2?

8 A. Nontolerant individuals?

9 Q. Yes.

10 A. Lack of coordination, poor judgment and red eyes,
11 glassy eyes.

12 It also depends as to whether we're talking
13 about .2 on the way up or .2 on the way down.

14 Q. Well, you have Mr. Southworth at .2 and going
15 upwards that evening, correct?

16 A. Well, at some point in time, it was going up, and
17 at some point in time, it was going down. If you look at
18 the graph, you can see that.

19 Even the graph that you showed me before
20 that was off the graph, there's still a portion that goes
21 up and a portion that comes down.

22 Q. At 9:30, his blood alcohol was going up, correct?

23 A. Correct.

24 Q. At 9:30, so assume for a nontolerant person, I

2-92

1 maybe have some problems getting dressed, putting their own
2 clothes on, or some slurred speech, probably their eyes
3 would look glassy, the lids might be droopy, and they would
4 probably -- depending upon how long it took.

5 Once again, if this is on the upward side of
6 the curve --

7 Q. Right.

8 A. -- those would be the things that I would be
9 looking for.

10 Q. And assuming on the upward side of the curve, we
11 went to, in a nontolerant person, what would you start to
12 expect seeing at .25?

13 MR. FARRAH: Nontolerant person?

14 MR. GILLIS: Nontolerant.

15 A. Further deterioration, staggering, difficulty
16 walking, difficulty doing typical things, can't find their
17 keys, can't get the key in the lock.

18 Q. How about at .3?

19 A. A lot of muscle relaxation, probably head
20 drooping, difficulty functioning.

21 Q. Would you have difficulty walking at that point?

22 A. Probably.

23 Q. Would you be vomiting at that point?

24 A. Can't tell.

2-93

1 Q. And at these various stages -- .2, .25, .3 -- for
2 a tolerant person, you would expect them to show those
3 similar signs but at a higher BAC, is that fair to say?

4 MR. FARRAH: Objection.

5 A. You may or you may see some of the more -- you'd
6 certainly see more of the more subtle things starting to
7 occur as well.

8 Q. Okay. Do you have any opinion as to how far a
9 tolerant person would trail behind a nontolerant person as
10 far as showing these signs; for example, a nontolerant
11 might at .2, but a tolerant person would at .22, something
12 like that?

13 MR. FARRAH: Objection.

14 A. There's a paper that addresses that. Almost
15 everybody shows some impairment at .2, even those who are
16 accustomed to drinking.

17 But instead of it being like a high
18 percentage of people like 70 or 80 percent, it's more like
19 20 or 30 percent who might show that.

20 Q. For the tolerant drinkers?

21 A. For tolerant drinkers. And by about .3, nobody
22 is tolerant. Everybody shows some sort of stigmata.

23 Q. From this chart, you can't tell --

24 MR. FARRAH: Which exhibit?

2-95

1 also asked to assume?

2 A. Either two or three.

3 Q. And those assumptions came from counsel, correct?

4 A. Yes.

5 Q. Okay. And that's when you came up with the top
6 end of that range, correct, the .2 or plus?

7 A. Well, if I took the hypothetical and plugged it
8 into the formula and then you asked me what would the BAC
9 be at a certain time, I just looked it up from the graph.

10 Q. In your 60-J affidavit, on Page 15 at the top, it
11 says, at approximately 9:30 p.m. when he was served his
12 last drink at the Longhorn Steakhouse, his BAC was
13 approximately .18 to .22, is that correct?

14 A. That's what it says.

15 Q. Okay. And the reason for that range is that you
16 assumed one amount of alcohol that he drank that night to
17 get to the high of a .22, and you were asked to assume a
18 lower amount of alcohol with a .18, correct?

19 A. Yes.

20 Q. And that's what I was referring to earlier. The
21 .22 is the fact pattern that we just talked about, the four
22 25-ounce beers at the table, correct?

23 A. Yes.

24 Q. And two 25-ounce beers at the bar, correct?

2-9

1 Q. Exhibit 13, you can't tell what was the absolute
2 high point for that evening of Mr. Southworth's blood
3 alcohol, correct?

4 A. I can't tell from that chart, no.

5 Q. Now, were you asked to assume a particular
6 Widmark R for purposes of your Rule 26 disclosure?

7 A. No.

8 Q. That's something you solely chose yourself,
9 correct?

10 A. Yes.

11 Q. How about the burn-off rate, did anybody ask you
12 to use a particular burn-off rate?

13 A. No.

14 Q. Okay. But you have been for your various
15 opinions asked to assume certain fact patterns as to how
16 much alcohol Mr. Southworth had to drink, correct?

17 A. Yes.

18 Q. And in your 60-J affidavit, you were asked to
19 assume four 25-ounce beers at the table, correct?

20 A. Yes.

21 Q. In addition to two 25-ounce beers at the bar
22 prior to sitting at the table, correct?

23 A. Yes.

24 Q. And do you remember how many Manhattans you were

2-9

1 A. Right.

2 Q. And one beer at the pit before they got to the
3 Longhorn, correct?

4 A. Right.

5 Q. And two or three Manhattans at the table as well?

6 A. Yes.

7 Q. Can you tell from your report what you were asked
8 to assume that got you up to the .18 as opposed to the .22
9 low end of that range?

10 A. Didn't we go through that? Wasn't that specified
11 earlier?

12 Q. If I had that, if I could put my finger on it, I
13 can give it to you.

14 MR. FARRAH: Page 10.

15 A. I'm almost certain we talked about it. At the
16 bottom of Page 10, Item 3 carrying over to the top of Page
17 11 at the top, I think that's the scenario.

18 If he consumed four 25 beers, it was .22 at
19 9:30. And if he consumed two 25, it was .18. Do you see
20 that on Page 11?

21 Q. Yes. So the difference between your two
22 calculations is two 25-ounce beers at the table.
23 Everything else is the same, correct?

24 A. That's correct.

2-97

1 Q. And the two 25-ounce beers at the table is what
2 the audit report shows was served to the table that
3 evening, correct?

4 A. Let me see your copy of the audit report, please.

5 Q. Here's the audit report, but I think it has the
6 total amount of the drinks to the table and the bill which
7 has been marked as an exhibit.

8 Here, Exhibit 5, can you tell how many
9 drinks on the bill it says how many beers were served to
10 the table that evening? Just the one page.

11 MR. FARRAH: What's the question?

12 Could you read back the question, please?

13 (Last question read).

14 A. Yes, I think that's what it says, although part
15 of this is cut off, Mr. Gillis. But I believe that this
16 line here that says, five ounce Bud Lites really means 25.

17 Q. So if we assume it should have been a two on the
18 photocopy, your understanding is that at least as to the
19 bill, there were only two 25-ounce Bud Lites served at the
20 table that evening, correct?

21 A. If you look at the audit report, that's what the
22 audit report says.

23 Q. Okay. Now, on these two different assumptions
24 you were asked to consider in putting together your 60-J

1 affidavit, did you do any independent evaluation of the
2 evidence to determine the credibility, the fact pattern
3 that you were asked to assume?

4 MR. FARRAH: Objection.

5 A. I didn't weigh it, no.

6 Q. So for the one with four beers at the table, you
7 didn't do any independent evaluation as to the credibility
8 of the facts that would support that assumption, correct?

9 MR. FARRAH: Objection.

10 A. I did not.

11 Q. And for the one with two beers at the table, you
12 didn't do any independent evaluation as to the credibility
13 of the facts upon which the assumption was based, correct?

14 A. Well, the audit report said that. But I didn't
15 weigh that, either.

16 Q. And then subsequent to that, you gave another
17 opinion with a different -- you came up to a different
18 blood alcohol in your Rule 26 submission in this case,
19 correct?

20 A. Well, I had a different set of assumptions.

21 Q. Okay. And where did those assumptions come from
22 counsel?

23 A. In part.

24 Q. If we have to go through it all again, I will,

2-99

1 but what part of your assumption was from counsel and what
2 part of your assumption was based on your investigation?

3 MR. FARRAH: I think he's already answered
4 that he can't break it down for you, that's what I think he
5 answered.

6 A. That's what I told you at the last deposition,
7 but, you know, I can support from Jude Connelly what I
8 mentioned earlier today for beers and three Jack
9 Manhattans --

10 Q. Well --

11 A. -- at the table.

12 Q. On the assumptions that you made in your Rule 26
13 submission, did you make any independent investigation as
14 to the credibility of the facts you were asked to assume
15 for purposes of rendering the opinion in that submission
16 which has been marked as Exhibit 1?

17 MR. FARRAH: Objection.

18 A. No, I didn't weigh it.

19 Q. Okay. Briefly, doctor, in that expert
20 submission, you've attached cases that you've recently
21 testified in, correct?

22 A. Well, within four years, I believe.

23 Q. And can you tell me why you didn't supply any of
24 the case citations?

2-100

1 A. Why I didn't supply any of the case citations?

2 Q. The actual citations so we could look up these
3 cases. It was just headings of cases, docket numbers.

4 A. I never knew that you had to. I thought you
5 just had to put in the name. That's all I've been doing.

6 Q. Now, starting -- you have the summary of your
7 qualifications here, and you talk about teaching seven
8 seminars for judges in Florida?

9 MR. FARRAH: Can you just tell us where
10 you're looking now?

11 MR. GILLIS: Page 1 of his Rule 26 report.

12 MR. FARRAH: 60-J? No. His Rule 26 report?

13 MR. GILLIS: Yes, his letter to you dated
14 October 18, 2006.

15 Q. The seven seminars that you said you spoke out in
16 Florida between '99 and 2006, which one of those deals with
17 the effect of ethanol and visible intoxication?

18 A. I don't talk too much about visible intoxication
19 except for referencing the AMA table because that's
20 primarily a criminal setting.

21 The judges are learning, it's a traffic
22 court seminar.

23 Q. So it has more to do with criminal impairment as
24 opposed to physical signs of intoxication in a civil case?

2-101

1 A. Yes, sir.
 2 Q. And on Page 2, you talk about the title of a
 3 presentation, the Importance of Developing a Chronology in
 4 Determining the Proximate Cause of Impairment and Mixed
 5 DUI, DUI cases, is that correct?
 6 A. Yes.
 7 Q. Where was that ever published?
 8 A. That was the citation I gave you last time in the
 9 Society of Forensic Toxicology. You wrote it down. I
 10 told you about that.
 11 Q. Could you repeat it for you? I don't remember
 12 writing it down.
 13 A. Sure I can repeat it for you. Austin, Texas,
 14 last year.
 15 Q. Okay. I know a lot of this is repetitive, but
 16 we're now on to your Rule 26. And even though it's very
 17 similar to the 60-J, I have to ask you the questions about
 18 this as opposed to the other document.
 19 On Page 2 of that document, the second
 20 paragraph -- do you have it in front of you there?
 21 A. I'm not sure that I do.
 22 MR. FARRAH: It's Exhibit 1.
 23 Q. Page 1 is basically two paragraphs, and I'll
 24 start with the bottom paragraph.

2-103

1 Q. You can't tell from when he got there to when he
 2 left at what point during that time period, although you
 3 know it's in that time period, when he showed visible signs
 4 of intoxication, correct?
 5 A. Well -- read that back for me, please.
 6 (Last question read).
 7 A. Well, I do know basically that, because the
 8 drinks were accumulating and the drinks are coming more
 9 quickly, that it's going to be in let's say the time
 10 interval a half to 45 minutes before they leave rather than
 11 in the earlier part of the evening.
 12 Q. Let's narrow that down. You know based on the
 13 way the alcohol was consumed it's more likely that he
 14 showed those visible signs later in the evening while at
 15 the Longhorn than earlier in the Longhorn, correct?
 16 A. That's exactly what I was trying to say, yes.
 17 Q. But you can't tell at exactly what time period it
 18 occurred based on just a visible signs, correct?
 19 A. Well, at least rhetorically, I'm giving you a
 20 time period. What I can't give you an exact clock time.
 21 Q. Okay. No exact clock time, correct?
 22 A. Yes.
 23 Q. And then you say other patrons at the Longhorn
 24 came over to his table. Do you know how many patrons came

2-10

1 It says, the paragraph that starts with, I
 2 conclude with reasonable scientific certainty --
 3 MR. FARRAH: Page 2.
 4 Q. I'm sorry, Page 2. And, like I asked you about
 5 your 60-J affidavit, as far as visibly intoxicated while
 6 still at the Longhorn Steakhouse, you can't say
 7 definitively during what time period he was visibly
 8 intoxicated, correct?
 9 A. Well, I can tell you from between -- and I don't
 10 mean to be flip -- between the time he got there, after
 11 8:30, before ten.
 12 I mean, I don't think he was intoxicated
 13 from the twelve-ounce beer after dirt biking and from the
 14 two doubles that he had at the bar. So that would bring
 15 us up to about 8:30 when they were seated or so.
 16 Q. Can you tell me -- let me rephrase. You can't
 17 tell what time between when he got there and when he left,
 18 whatever those time frames are --
 19 A. Well, I tried to just tell you --
 20 MR. FARRAH: I think he just answered that
 21 question.
 22 Q. -- let me finish.
 23 MR. GILLIS: No, he didn't. He put a time
 24 frame in there.

2-10

1 over?
 2 A. Well, I know it's at least one. It was either a
 3 patron, or I think they said it was a woman who worked in
 4 the bar or whatever, came over and told them to be quiet.
 5 Q. So when you conclude to a reasonable degree of
 6 scientific certainty, you don't know whether it was an
 7 employee or a patron, correct?
 8 A. I'm not certain, that's correct.
 9 Q. Or the exact clock time when that occurred,
 10 correct?
 11 A. Right. I mean, if it will make it easier, I
 12 don't have a clock time answer for you in any of the
 13 questions with the exception of the 9:30 time period when
 14 all of the prior drinks have surmounted and he's ordering
 15 the last one.
 16 Q. Well, that's based on the assumption that you
 17 made as to when those drinks got to him and that those
 18 drinks that were ordered were actually for him, correct?
 19 A. Basically, yes.
 20 Q. Okay. And while you can calculate what his
 21 blood alcohol is and what the standard is for nontolerant
 22 people, whatever, you would expect him not to show visible
 23 signs until higher than a nontolerant person because he's a
 24 tolerant drinker, correct?

2-105

1 A. No. That mischaracterizes my testimony.
 2 Q. What is your testimony?
 3 A. My testimony --
 4 MR. FARRAH: Objection.
 5 A. -- is that whereas other people may be staggering
 6 at that time, he may just be showing slumping of the
 7 shoulders or not carrying himself or other less profound
 8 stigmata, but still, of course in the eyes of his colleague
 9 Jude Connelly, recognizable as indicating intoxication.
 10 Q. He would mask it better than a nontolerant
 11 drinker, correct?
 12 A. Yes, he would.
 13 Q. Are you aware as you sit here today of anybody
 14 other than Jude Connelly that you, that stated he showed
 15 visible signs of intoxication at the table?
 16 A. I am not --
 17 Q. Okay?
 18 A. -- unless you want to include the person that
 19 came over to the table and told him to be quiet.
 20 Q. I think we went through that last time. The
 21 fact that the table was loud --
 22 A. Right.
 23 Q. -- doesn't necessarily mean, is not conclusive
 24 proof that Mr. Southworth was intoxicated, correct?

2-107

1 MR. FARRAH: Objection to the form.
 2 A. Well, I don't know. I'm thinking that Jude
 3 Connelly said something to the effect of what I just
 4 reported to you.
 5 Q. So your testimony is that Jude Connelly said
 6 Southworth himself was loud as opposed to the table?
 7 A. Let me see if I can find it.
 8 Q. I'll withdraw the question. It's not important
 9 at this point. We're running short on time.
 10 A. Okay.
 11 Q. The documents that you reviewed for this opinion
 12 are listed on Page 3 going into the top of Page 4, correct?
 13 A. Yes, sir.
 14 Q. Is there any documents that you requested at the
 15 time that you gave this opinion that you needed that were
 16 not provided to you in order to make your opinion in this
 17 case?
 18 A. No.
 19 Q. Was there anything that you needed at that time
 20 prior to making this opinion that would have in your
 21 opinion more accurately given you a more accurate opinion
 22 in this case?
 23 A. Well, I revert to my prior comment about liking
 24 to have one of the glasses and to have had the contents

2-10

1 A. Well, those are two independent statements, Okay?
 2 And -- so those are two independent statements.
 3 Q. Are you going to testify in this case that the
 4 patron came over to the table to tell him to quiet down
 5 knew that he was visibly intoxicated, Mr. Southworth?
 6 MR. FARRAH: Objection.
 7 A. I don't know if the patron knew he was
 8 intoxicated, but I knew certainly the patron knew that they
 9 were making too much noise for the patron and his or her
 10 friends to enjoy their dinner.
 11 Q. And "they" being the whole table, not just Mr.
 12 Southworth, correct?
 13 A. Well, that's true.
 14 Q. Okay. And --
 15 A. Let me amend that. One of the things that Jude
 16 Connelly said was that Jeffrey was usually a pretty quiet
 17 person, didn't really speak up. So the fact that he was
 18 loud is a significant factor.
 19 Q. I don't want to mince words, but the testimony
 20 was that the table was loud, correct?
 21 A. I understand, but --
 22 Q. There's no independent testimony that you're
 23 aware of that says that Mr. Southworth, just Mr. Southworth
 24 himself was loud, correct?

2-10

1 from the glass so I could have gotten it analyzed, and then
 2 I wouldn't have to rely on plaintiff's counsel to ask me to
 3 assume something. We would have had a concrete number.
 4 Q. And those requests were made but just not
 5 complied with, correct?
 6 A. Well, he doesn't have to comply with my requests.
 7 Q. Based on your requests, did you ever get those
 8 materials?
 9 A. No.
 10 MR. FARRAH: Haven't we been over that
 11 already?
 12 MR. GILLIS: No. Well, we went over it for
 13 the purposes of the 60-J. This is different.
 14 A. Although we were talking about the same data, Mr.
 15 Gillis.
 16 Q. Since you gave this opinion, are there further
 17 documents that you've reviewed in order to make your --
 18 strike that.
 19 Since you gave your opinion in this, have
 20 you come upon new documents that have changed your opinion
 21 in this case in any way?
 22 A. No.
 23 Q. And by your opinion, I'm talking about --
 24 A. My ultimate opinion.

2-109

1 Q. -- I'm talking about the exhibit that you
2 submitted that is --
3 MR. FARRAH: Exhibit 1.
4 A. We're talk about the Rule 26 report, the initial
5 Rule 26 report?
6 Q. What you have in front of you, Exhibit 1, yes.
7 A. We're talking about the same thing, yes.
8 Q. Okay. And you mention on Page 8, the paragraph
9 referring to Douille, D-o-u-i-l-l-e, certain -- I'll read
10 the sentence starting on Line 5.
11 Certain signs of visible intoxication will
12 constitute knowledge of the patron's intoxication but so
13 would the number of drinks consumed per hour, correct?
14 A. Yes.
15 Q. What number of drinks consumed per hour are you
16 opining should have put the Longhorn on notice of Mr.
17 Southworth's intoxication on September 26, 2003?
18 MR. FARRAH: Objection.
19 A. Well, I think in particular, between nine o'clock
20 and 9:35. But if you want to, you can take the entire
21 interval from a little after eight o'clock to 9:35. If
22 you take --
23 Q. Okay. So if --
24 MR. FARRAH: Let him finish.

2-111

1 So there is one, two, three, four double
2 beers is eight and four, so that's twelve. That would be
3 the equivalent of twelve, twelve-ounce cans of beer between
4 eight o'clock and 9:30.
5 Q. And that's assuming as to your assumptions as to
6 what he actually had that night are accurate, correct?
7 A. Well, what I have here, if just assuming that
8 that is the correct number, that is a large number of
9 drinks to serve in a short period of time.
10 Q. Okay.
11 A. That's also a criterion in the bartender's guide
12 that we had here as an exhibit that you marked last time,
13 and that's also consistent with what's taught in the TIPS
14 program in terms of how many drinks per unit time.
15 Q. That's, your entire answer is based on the
16 assumption you were asked to make for purposes of putting
17 together this opinion, correct?
18 A. Okay. Well, for purposes of doing this
19 calculation.
20 Q. Okay. And it's kind of a rhetorical question,
21 but if he didn't have all that to drink, your assumptions
22 would have to be different, correct?
23 MR. FARRAH: Objection.
24 A. If he didn't, the assumptions calculations and so

2-11

1 A. Yes, let me just finish, okay? If you start at a
2 little after eight o'clock, assuming they come in and sit
3 at the bar a little after eight o'clock and they have two
4 25-ounce beers at the bar, and then they're seated around
5 8:30, 8:40, and then they cash out the last service --
6 let's just say this: The last service is at 9:35 and they
7 cash out at almost ten o'clock.
8 If you go from eight to 9:35, there are one,
9 two, three, four, five, six, seven drinks served.
10 Q. To Mr. Southworth?
11 A. I'm sorry?
12 Q. To Mr. Southworth?
13 A. Yes. Each one of those drinks, that's seven in
14 number. But each double beer is just that, it's like two
15 twelve-ounce beers.
16 And even with this calculation on the Jack
17 Manhattans, if you take the three Jack Manhattans at .85,
18 four ounces of ethanol and you add them together, that's
19 three eighths is 24, and twelve is about 25, that also
20 comes out to be more than -- it's just like a 1.4 beers,
21 1.4 beers, and 1.4 beers.
22 So it's like four beers. If I convert it to
23 equivalents, it's four beers for the Jacks and each of the
24 double beers are double beers.

2-11

1 forth would be less. But depending upon how many few you
2 asked me to assume, Mr. Gillis, that would the factor that
3 would depend on whether I answered you, that's excess, I
4 believe, and that's not excessive.
5 Q. Getting back to the original question here, how
6 many drinks would have to be served to Mr. Southworth that
7 evening at the Longhorn before the wait staff should have
8 been on notice of his intoxication?
9 MR. FARRAH: Objection.
10 A. Don't they have a policy on that?
11 Q. I'm asking you what your opinion is, not what the
12 policy is, not what Mr. Farrah, all the drinks he told you
13 to assume.
14 I'm asking, one to a hundred, how many
15 drinks could he have had before you feel that the wait
16 staff should have been on notice of his intoxication?
17 MR. FARRAH: Objection.
18 A. Okay. That's a fair question. Let me answer
19 it for you this way.
20 You know that I say that you can use about
21 .02 as a ballpark for each beer. With Mr. Southworth, he's
22 going to have on an empty stomach from a twelve-ounce beer
23 a lot lower than .02 because of his increased body weight.
24 So even if you use .02, which is not a

2-113

1 correct number but it's an easy number to work with in an
 2 example, then that means if you're going to burn-off one
 3 beer an hour and they're there from eight to 9:30, that's
 4 an hour and a half.

5 As soon as he has his second double beer,
 6 he's now already at the point what he can't burn those two
 7 double beers off until more than two hours.

8 So everything he drinks beyond two double
 9 beers is going to accumulate in his body. And those Jack
 10 Manhattans, the way they're calculated, they are 1.6 beers
 11 each because a typical Budweiser twelve-ounce can of beer
 12 like the one that he had after dirt biking is about .5
 13 alcohol.

14 And these are calculated, even with the
 15 smaller amount of volume in the glass, these are calculated
 16 to be .84.

17 MR. GILLIS: I'm going to move to strike.

18 Q. The question was very simple, David. What number
 19 of drinks --

20 MR. FARRAH: He was answering your question.

21 Q. -- if you can put it in twelve-ounce beers like
 22 you recalculated all the Manhattans to, and you
 23 recalculated the double beers.

24 Based on your assumption that he was

2-115

1 notice of his visible intoxication that evening if he was
 2 there drinking from eight to 9:30?

3 MR. FARRAH: Objection.

4 Q. How many?

5 A. Well, we have the food, too, that we have to
 6 factor in.

7 Q. Just give me an answer.

8 MR. FARRAH: Same objection.

9 A. Read back the question for me, please.

10 (Last question read).

11 A. Probably about twelve.

12 Q. Okay. And I'm going to ask the same question,
 13 one word changed, and that is take out the word visible.

14 The equivalency of how many twelve-ounce
 15 beers should they have to serve him before they should be
 16 on notice of Mr. Southworth's intoxication?

17 MR. FARRAH: Objection.

18 A. Okay. Now, you recall at the beginning of this
 19 deposition, I made a distinction between impairment and
 20 intoxication.

21 And to me, intoxication means that people
 22 can look and see. And you've taken the word visible out
 23 but you've left the word intoxication in --

24 Q. I know, but in --

2-11

1 drinking there from eight to 9:30, how many twelve-ounce
 2 beers would they have to serve him before they should be on
 3 notice of his visible intoxication?

4 MR. FARRAH: Objection.

5 A. Well, I'm not going to sit here and do that
 6 calculation, but what I am going to reference you to is the
 7 Rule 26 report where I laid out all of that.

8 I talked about what his rate of climb would
 9 be on his blood alcohol.

10 Q. I know you did. But --

11 MR. FARRAH: Let him finish, please. This
 12 is the second time you're interrupted him on a question you
 13 obviously think is very important.

14 Q. You put in your --

15 MR. FARRAH: Let him answer the question.

16 Q. You put in your guide there what the rate of
 17 climb of alcohol was based on what you were asked to
 18 assume, correct?

19 A. Yes, I did.

20 Q. I'm not asking you that. I'm asking you very
 21 simply as an expert, how many beers or the equivalency
 22 thereof -- strike that.

23 What would they have to serve him in the

24 equivalency of twelve-ounce beers before they should be on

2-11

1 MR. FARRAH: Let him finish. This is the
 2 third time you're interrupted him.

3 Q. Look at your sentence there what it says --

4 MR. FARRAH: Wait a minute. Let him finish.

5 MR. GILLIS: We can save three hours of
 6 nonresponsive.

7 MR. FARRAH: Please. What are you showing
 8 him?

9 Q. You put the patron's intoxication.

10 MR. GILLIS: Page 8 of Exhibit 1.

11 A. Yes. But I prefaced it on the prior line by
 12 saying visible intoxication, and I'm using intoxication
 13 there in the same way.

14 Q. Is it fair to say when you use the word
 15 intoxication, a patron's intoxication and the word visible
 16 is not there, you mean it's interchangeable with visible
 17 intoxication?

18 MR. FARRAH: Objection.

19 A. Yes, that's what I'm saying.

20 Q. Okay. I don't want to put words in your mouth.
 21 I just want to make sure these two things mean the same
 22 thing?

23 A. Yes. That's helpful to me, Mike.

24 MR. GILLIS: Are you about ready?

2-117

1 MR. FARRAH: First of all, I have questions
2 to ask him. Are you saying, you're done? I have a couple
3 of questions for him.

4 MR. GILLIS: I'm not done. I have a couple
5 more hours to go. It's now 5:13 and he said he wanted to
6 leave at 5:05.

7 A. I would be grateful if we could finish up.

8 MR. FARRAH: I do have some questions I want
9 to ask him.

10 MR. GILLIS: It's not your turn yet, Al.

11 MR. FARRAH: I understand. So let me also
12 say this.

13 MR. GILLIS: No. Then I'm going to keep
14 going if he's going to stay because I've got plenty more to
15 go at it. Do you want to leave or do you want to --

16 A. Well, I'd like to leave, of course. I think we
17 all would. It's Friday afternoon.

18 MR. FARRAH: Well, let me make a statement
19 on the record, okay?

20 A couple of things. First of all, I have
21 questions to ask him.

22 Secondly, at the beginning of this
23 deposition, you claimed some prejudice because you had not
24 had a chance to review the materials that were sent to you

2-119

1 MR. FARRAH: Okay.

2 MR. GILLIS: Thank you very much, Al.

3 MR. FARRAH: You're welcome.

4 MR. GILLIS: I think we're going to have the
5 Court determine whether or not what you recently submitted
6 to me is going to be stricken or not in order to continue
7 his deposition, and I'll try to get that motion out
8 shortly.

9 MR. FARRAH: Then let's do that.

10 MR. GILLIS: Okay. That's one thing.

11 Second of all, the prejudice we're claiming
12 is that you didn't provide us with materials that you have
13 had in your possession for more than two years, A; and B,
14 you've now two years after he submitted, almost two years
15 his first opinion and then six months after he submitted
16 his second opinion, and a week after we spent, what was it,
17 \$2600 to take his deposition, you then change his opinion,
18 and he's already said there's no new evidence that he's
19 basing it upon.

20 So that's the prejudice, the failure to
21 provide materials that you had in your possession and you
22 were supposed to provide, A; and B, the change of your
23 opinion a third time well after the deadline and after his
24 deposition is commenced.

2-1

1 with your colleagues, your two colleagues who accompanied
2 you to both depositions last week, and you talked about
3 reserving your right to take further depositions, a further
4 deposition of Mr. Benjamin.

5 I have questions I want to ask him. You
6 and I have made an agreement that I can have 60 days from
7 the time that you file your motion for summary judgment to
8 respond, and in the interest of giving you every
9 opportunity to ask him any questions you want to ask him,
10 I'm willing to shorten that time on my end to 30 days -- I
11 don't need 60 days to respond -- and to work with Mr.
12 Benjamin and you to fix another date for his deposition at
13 which time you'll be able to ask him any questions you want
14 to ask him, and I can ask him any questions I want to ask
15 him and still accommodate the schedule that we've
16 established.

17 MR. GILLIS: Well, I don't know how we can
18 do that without going to Court and moving to strike on
19 his --

20 MR. FARRAH: I'm sorry. I can't hear you.

21 MR. GILLIS: One second.

22 MR. FARRAH: Do you want Mr. Bikofsky to
23 tell you what he's written you?

24 MR. GILLIS: No. I can read it myself.

2-12

1 MR. FARRAH: What materials didn't we
2 provide you that we had two years ago?

3 MR. GILLIS: The Widmark for the 60-J
4 affidavit, the photographs, the photographs of the glass,
5 the photographs that he has now changing his entire Widmark
6 R on, the body weight.

7 MR. FARRAH: Those photographs -- let me be
8 clear. The photographs which are now Exhibits 13 in this
9 case are photographs that are as available to you as they
10 are available to me.

11 These are merely photographs that the police
12 produced and --

13 MR. GILLIS: Are you saying you're not
14 required under the rules to produce those if you have them?

15 MR. FARRAH: If I have documents that I got
16 from the police, not by subpoena, I don't think I'm under
17 an obligation to produce those to you.

18 MR. GILLIS: I'll review the rules then.

19 MR. FARRAH: But these are documents -- let
20 me just be clear on this.

21 Exhibits 14 and 15 are documents that he
22 referred to in his 60-J affidavit, and they're also
23 documents that he testified to -- excuse me.

24 They're documents that he referred to in his

2-121

1 Rule 26 report and they're also reports that he said he did
2 not have or asked for at the time of his 60-J affidavit.

3 With respect to the Exhibit 13 --

4 MR. GILLIS: What he referred to is --

5 MR. FARRAH: Let me finish. With respect to
6 Exhibit 13 which is the Widmark calculation, this was not
7 attached to -- I don't believe this was attached to the
8 60-J report or referenced in it. And it was through
9 oversight that that was not included.

10 There's no reason for us not to have
11 submitted to you the Widmark calculation. Simply an
12 oversight. I apologize for it.

13 I don't think you're prejudiced by it. You
14 had it as of last week.

15 In terms of -- and I just want to make this
16 statement for the record so that you can know where I'm
17 going because I think I know where you're going.

18 In terms of the prejudice of his
19 supplemental report saying that he's going to testify
20 consistent with or about what was in his 60-J affidavit is
21 something I have a hard time seeing since you made his 60-J
22 affidavit an exhibit in this case.

23 You questioned him about it, and certainly
24 had it available to give to your expert, and I dare say you

2-12

1 probably did give it to your expert.

2 You've questioned him about it the last time
3 and then again today, and the fact that he is, the fact
4 that he has expressed some opinions there in that affidavit
5 that are different from the Rule 26 report is simply, as I
6 think he's testified, that he's been asked to assume
7 different scenarios.

8 Given the evidence in this case, it can't be
9 prejudicial to you that we're now seeking, should the
10 occasion arise, to say to the jury, this is a calculation
11 you can consider based on the evidence in the case, based
12 on what Jude Connelly has testified to at the grand jury,
13 based on the statement he made, based on what the various
14 witnesses in the case have testified to.

15 The rest of the, of what was supplied to
16 you, Exhibit 9 which follows up on his statement to you
17 that he relied on certain hypotheticals and supplies you --
18 excuse me -- Exhibit 10 which follows up on the statement
19 to you that he was asked to assume certain hypotheticals
20 and provides the basis for the hypotheticals, it's
21 something you've had for a week and I don't think in any
22 way prejudices you. But be that as it may.

23 So you decide. If you want to move to
24 strike, that's fine. I can't stop you. But I'm just

2-123

1 letting you know what our position is on the record. I
2 don't see the prejudice.

3 MR. GILLIS: It's more than that, Al.
4 First of all, we're going on the assumptions of his
5 published reports that he uses a 6-8 Widmark, and all of a
6 sudden, we find out it's a 6-4 --

7 MR. FARRAH: It's a 6-4 in his Rule 26
8 report.

9 MR. GILLIS: And he's using a 6-8, we find
10 out today in his prior report. That's extremely important.

11 You're now claiming he's going to use four
12 and a half ounces of alcohol in the drink, when all along,
13 you're claiming two and a quarter.

14 In addition, he's now telling us that for
15 three years, he's been telling you he's going to get the
16 glass, get the drink, and do it in front of the jury.

17 MR. FARRAH: That's not what he testified to
18 at all.

19 MR. GILLIS: I think we both put our
20 positions on the table. I don't think we have to go any
21 further.

22 MR. FARRAH: Fine. But I want the record to
23 be clear. I have questions I want to ask him, so it's
24 really your call.

2-12

1 MR. GILLIS: On your dime, you're more than
2 welcome to.

3 MR. FARRAH: Well, let's resume, and we'll
4 do that.

5 MR. GILLIS: So we're suspended.

6 VIDEO OPERATOR: The time is now 5:23 p.m.,
7 and we're off the record.

8 (Deposition suspended at 5:23 p.m.)
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2-125

CERTIFICATE

1
2
3 **COMMONWEALTH OF MASSACHUSETTS)**
4 **) ss.**
5 **COUNTY OF MIDDLESEX)**
6
7 **I, Josephine C. Aurelio, Registered**
8 **Professional Reporter, a Notary Public within and for the**
9 **Commonwealth of Massachusetts, do hereby certify:**
10 **That DAVID M. BENJAMIN, whose deposition**
11 **is hereinbefore set forth, satisfactorily identified**
12 **themselves, was duly sworn by me, and that such deposition**
13 **is a true record of the testimony given by such witness.**
14 **I further certify that I am not related**
15 **to any of the parties to this action by blood or marriage**
16 **and that I am in no way interested in the outcome of this**
17 **matter.**
18 **IN WITNESS WHEREOF, I have hereunto set**
19 **my hand this 20th day of February 2007.**
20
21 **My Commission expires:**
22 **January 14, 2011**
23
24

Notary Public in and for the
Commonwealth of Massachusetts

2-126

1 **I, DAVID M. BENJAMIN, having been duly sworn**
2 **according to law, and under the pains and penalties of**
3 **perjury, depose and say that I have read the foregoing**
4 **transcript of testimony, and that it true and correct to**
5 **the best of my knowledge, information, and belief.**
6
7
8
9 **COMMONWEALTH OF MASSACHUSETTS)**
10 **) ss.**
11 **COUNTY OF)**
12
13
14 **having been satisfactorily**
15 **identified and duly sworn before me, this _____ day of**
16 **_____, 2007.**
17
18 **Notary Public in and for the**
19 **Commonwealth of Massachusetts**
20
21 **My Commission expires:**
22
23
24

2-127

ERRATA SHEET

1
2 **Corrections should be made as follows:**
3 **Page, line Should read:**
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11

1 produce?

2 MR. FARRAH: Objection.

3 A. Excuse me.

4 MR. FARRAH: You can answer.

5 A. I don't have a normal or a typical type of

6 thing. Every report I write is case specific.

7 Q. Based -- this particular report that you wrote

8 in this case, did you review documents before

9 writing it?

10 A. Yes, I did.

11 Q. And are those documents listed in here?

12 A. They should be.

13 Q. Why don't you take a look at it, and tell me

14 what you reviewed in order to make your opinion

15 in this case?

16 A. The documents reviewed for the preparation of

17 this report are listed on page three of the

18 report. When I refer to the number, I'm

19 referring to the numbers that I assigned to the

20 pages.

21 Q. That would be three at the top of the page,

22 correct?

23 A. That is correct, three at the top of the page.

24 Q. Are there any other documents that you have

1 A. The document to which I was referring is called

2 a Server Guide. It's a three-page document and

3 I don't believe that I had seen it prior to

4 finalizing the report. I think I saw it

5 subsequently, so that's why it wasn't listed

6 among those documents.

7 Q. Okay. You weren't given the entire book, you

8 were just given three pages of it?

9 A. That is correct.

10 MR. FARRAH: Objection.

11 Q. And you seem to have a bar recipe document with

12 you as well, is that correct?

13 A. I do.

14 Q. Did you review that in ordinary to make your

15 determination in this case?

16 A. I'm not sure if I did or did not. Let me see if

17 I have listed it here.

18 I did not list it so the likelihood is

19 I did not rely on it.

20 Q. When did you -- are there any documents that are

21 not listed in your expert report that you

22 reviewed but did not rely upon other than what

23 you have just mentioned, the bar recipe?

24 A. Ask that again, please.

10

12

1 reviewed in the preparation of this report other

2 than the documents that are listed on page three

3 of your expert report?

4 A. There may be one other document.

5 Q. What would that be?

6 A. That document would be a document that was put

7 out by one of the alcohol trade associations

8 providing guidance to tavern keepers about how

9 many drinks they should serve to people of

10 various body sizes in order to avoid getting

11 them intoxicated.

12 Q. Why isn't that put in here with the document,

13 under Documents Reviewed?

14 A. I believe it came to my attention after the

15 report was prepared.

16 Q. Is that document here with you today?

17 A. I do have a copy of it.

18 Q. Could you get a copy of that out?

19 A. Yes, sure.

20 Maybe you could just, instead of me

21 unhooking, just swivel around and get my little

22 briefcase case.

23 MR. FARRAH: This one here?

24 (Document handed to Attorney Gillis.)

1 Q. You have listed on page three of your report

2 documents upon which you relied and reviewed in

3 this case, correct?

4 A. Yes.

5 Q. You have just testified that you believe you

6 reviewed the bar recipe book papers that you

7 have there, but you did not rely upon it in

8 making your opinion in this case, correct?

9 A. I'm not sure if I did or did not rely on that

10 bar recipe. I just don't --

11 Q. Are there any other documents that you reviewed,

12 whether you relied on them or not, that are not

13 listed on page three of your expert report?

14 A. I don't believe so.

15 Q. Okay. Can I see the documents that you have

16 there with the bar recipe book, please?

17 This packet of documents that you have

18 handed to me, what does that -- what is that?

19 A. That's a packet of documents I wanted to bring

20 with me because I thought it might be helpful to

21 me today.

22 MR. GILLIS: Can we get those marked

23 as an exhibit, please?

24 MR. FARRAH: Sure. Can we get copies?

13

15

1 MR. GILLIS: Sure.

2 MR. FARRAH: Do you want to say what
3 they are for the record, Mike?

4 MR. GILLIS: For the record, the first
5 page is, states it's the Longhorn Bar Recipe
6 followed by some various glasses. Subsequent to
7 that is a grand jury exhibit which appears to be
8 the statement of Jude Connelly. Following that,
9 testimony from -- which appears to be the grand
10 jury testimony of Jude Connelly. Following that
11 is an investigation of the EZ-ALC computer
12 program for the -- which I believe is the
13 Widmark Graph.

14 THE WITNESS: W-i-d-m-a-r-k.

15 MR. GILLIS: Following that is a
16 Widmark Formula with handwritten calculations.
17 And following that is the audit report which I
18 believe is already marked in this case as
19 Exhibit 4.
20 (Exhibit 5 marked for identification.)

21 THE WITNESS: Maybe you want to
22 include the Server Guide in that exhibit?

23 MR. GILLIS: Sure. For the purposes
24 of it, to add on to it, we'll put at the back of

14

1 that three pages which purport to be the cover
2 and a couple of pages from the server guide, bar
3 code server guide which we'll make as a part of
4 Exhibit 5.

5 Q. Doctor, did any of the documents that are in
6 Exhibit 5 change your opinion in any way in this
7 case?

8 MR. FARRAH: Objection.

9 A. Change my opinion from what to what, at what
10 point in time?

11 Q. You gave a report, an opinion in this case that
12 is written and has been marked as an exhibit
13 here, correct?

14 A. Yes.

15 Q. And you stated that in Exhibit 5, you have
16 additional documents that you have reviewed
17 other than the ones that are in there, correct?

18 A. Right. Over and above whatever I relied on for
19 the report.

20 Q. With the exception of the audit report, those
21 other documents weren't documents that were
22 listed in your report, correct, as documents
23 that you reviewed?

24 A. Well, maybe some of the witness statements and

1 deposition statements were, Mr. Gillis.

2 Q. Were any of the documents that weren't already
3 listed as being reviewed that are part of that
4 packet, did any of them change in any way the
5 written opinion that you have given in this
6 case?

7 A. Okay. Could I have that exhibit back, please?

8 Q. Sure.

9 A. I would say that the bar recipe document that we
10 have on the top of Exhibit 5, the second page of
11 that document down at the bottom where it says
12 Manhattan Up, which is the glass that's used to
13 serve the Manhattans, is described as a
14 six-ounce cocktail glass. The formula given for
15 preparing the Manhattan is two ounces of bourبون
16 and a quarter ounce of sweet vermouth. That's
17 two and a quarter ounces, yet there appear to be
18 an inconsistency between how you get two and a
19 quarter ounces into a glass that says six
20 ounces, when that glass was served, it was
21 supposed to only -- it's supposed to have volume
22 almost up to the top.

23 There seems to be a discrepancy
24 between the way the Manhattans are actually

16

1 served and the bar recipe in terms of the volume
2 of liquid in the glass.

3 Q. You were not aware of that when you rendered
4 your opinion in this case?

5 MR. FARRAH: Objection.

6 A. I was aware of a discrepancy. And I still have
7 not had adequately explained to me how that --
8 how they could serve a drink.

9 I saw the photo of a served drink
10 which is a -- in a six-ounce, Manhattan-type of
11 glass, and that certainly is more than two and a
12 quarter ounces. I don't understand how there
13 can be a representation that the Manhattan is
14 two and a quarter ounces at this formula, as
15 opposed to what I saw which was a -- an almost
16 six-ounce drink.

17 Q. Where did you see the photograph?

18 A. Mr. Farrah showed it to me.

19 Q. He provided you with photographs of drinks?

20 A. He showed me a photograph that he had taken.

21 Q. He himself?

22 A. Yes.

23 Q. And the photograph was of a drink in a six-ounce
24 glass or that's what you thought it was?

17

1 A. That's what it appeared to be and that's how it
2 was represented to me.
3 Q. When were you shown the photograph?
4 A. Months ago.
5 Q. How many months ago?
6 A. I can't break it down any closer than that for
7 you.
8 Q. Was it last summer, last fall? What time frame?
9 A. I have -- it has no meaning to me at all,
10 Mr. Gillis.
11 Q. Was it before or after November 1st?
12 A. I can't answer that either.
13 Q. But you were aware of the size of the glass
14 before you rendered your opinion, correct?
15 A. I was, and it was a source of concern for me.
16 Q. But you were able to render an opinion anyways,
17 correct?
18 A. I was.
19 MR. FARRAH: Objection to the form.
20 MR. GILLIS: I don't believe those
21 photos have been produced.
22 MR. FARRAH: To the extent they
23 haven't, I think he said a photo. I'll produce
24 it.

18

1 MR. GILLIS: I appreciate it.
2 MR. FARRAH: Sure.
3 Q. So in addition to the materials that you said
4 you reviewed, you have also reviewed a
5 photograph, correct?
6 A. Yes.
7 Q. Anything else that you reviewed in this case?
8 A. Not that I recall.
9 Q. Have you been out to the restaurant at all?
10 A. No.
11 Q. Have you measured any drinks yourself out at the
12 restaurant?
13 A. No.
14 Q. Has anybody brought you alcohol and asked you to
15 determine the alcohol content related to this
16 case?
17 A. No.
18 Q. Have you visited or aware of anybody who visited
19 the establishments where the employees who
20 worked there on September 26, 2003, are
21 currently worked or previously worked?
22 A. I don't understand that question.
23 Q. Did you go to any bar to review anything in this
24 case?

19

1 A. No.
2 Q. You haven't been to the Longhorn?
3 A. Haven't been.
4 Q. To the Longhorn Steakhouse in Leominster?
5 A. I said I haven't been there.
6 Q. Have you been to any Longhorn Steakhouse?
7 A. No.
8 Q. Have you been to any restaurant that you
9 understand employees who work there back in
10 September of 2003 are currently working?
11 A. No.
12 Q. Getting back to the question that we're on, is
13 there anything else now that you can -- physical
14 evidence or written materials -- anything that
15 you reviewed in order to make your opinion in
16 this case?
17 A. No.
18 Q. Okay. Based on what you have been able to
19 review, do you feel you're able to make an
20 opinion in this case as to the amount of alcohol
21 that was served to Jeffrey Southworth that
22 evening?
23 MR. FARRAH: Objection.
24 A. I think I can represent the number of drinks,

20

1 and if I exclude the concern I have about the
2 Manhattan, the two volumes and the formulas
3 being inconsistent, I can certainly make an
4 estimate of what the minimal amount of alcohol
5 would have been in that Manhattan.
6 Q. What did you use in order to render your opinion
7 in this case as the amount of alcohol in the
8 Manhattans that were served to Jeffrey
9 Southworth that evening?
10 MR. FARRAH: Can he look at his
11 report?
12 A. I think what I used was an ounce and a half of
13 Jack Daniels and three-quarters of an ounce of
14 vermouth.
15 Q. How did you come up with that combination?
16 A. When I asked plaintiff's counsel what kind of a
17 hypothetical or the facts of the hypothetical he
18 would be asking me in court, those were what I
19 was instructed to use.
20 Q. So your opinion in this case is based on at some
21 point in the evening, Mr. Southworth having a
22 Jack Daniels Manhattan to drink, correct?
23 A. Several.
24 Q. For the purposes of those Jack Daniel

21

23

1 Manhattans, you're assigning to that drink one
2 and one-quarter ounce?

3 A. One and a half ounce of 80 proof Jack Daniels
4 and three-quarters of an ounce of sweet
5 vermouth.

6 Q. Based on the materials that you reviewed, did
7 you independently come up with any amount of
8 alcohol that you believe these drinks -- were
9 contained in these drinks this evening?

10 MR. FARRAH: Objection to the form.

11 A. I don't understand what you're asking now.

12 Q. You read materials in this case, correct?

13 A. I did.

14 Q. Some of those materials had to do with drinks in
15 this case, correct?

16 A. With numbers of drinks served and the names of
17 the drinks.

18 Q. Based on anything that you reviewed in this
19 case, did you come up with an amount of alcohol
20 in those Manhattans that was different than what
21 you just testified to as provided to you by
22 plaintiff's counsel?

23 A. What I believe I just testified to was the
24 amount that I used in my calculations.

22

1 Q. Why did you use that amount?

2 A. Because that amount is lower than the amount in
3 the book that would not overestimate it, or it
4 gave me a conservative estimate that I could say
5 to you if indeed the formula was different, such
6 as two ounces of the higher proof liquor, or
7 maybe even more ounces to fill up the six-ounce
8 glass, the calculations that I did were more
9 conservative and would, therefore, represent a
10 blood alcohol concentration that was lower than
11 what a higher number could be. So it was at
12 least what my calculation showed could be
13 higher.

14 Q. But the opinion you gave is the one that you
15 believe is most accurate opinion for that
16 evening, correct?

17 MR. FARRAH: Objection.

18 A. The one that I gave was the one that was based
19 on the hypothetical that would be put to me in
20 court. And I felt it was reasonable to respond,
21 and I still have that same question in my mind,
22 Mr. Gillis. There's no question about it.

23 Q. Did you, in putting together your chronology in
24 your expert report for that evening, did you

1 determine the chronology yourself or was that
2 given to you by plaintiff's counsel?

3 MR. FARRAH: Objection to the form.

4 A. It was a combination of both. I went through
5 the -- what did you call it? Not the bar bill.
6 You called it an inventory or something, was
7 that the expression that you used? The
8 inventory.

9 I went through the inventory and I
10 tried to, between the inventory and the
11 testimony of the fact witnesses -- in
12 particular, the wait staff and the young lady
13 who was waiting on these gentlemen that night --
14 and the deposition testimony, the witness
15 statements and where I could not fill in the
16 blanks, I asked plaintiff's counsel to assist me
17 in completing the assumptions of the
18 hypothetical scenario.

19 Q. Can you determine which of the facts that you
20 used in your hypothetical are facts that you
21 determined and which are facts that were
22 determined by counsel?

23 MR. FARRAH: Objection.

24 A. Certainly, I cannot discriminate at that level,

24

1 no.

2 Q. Now, were any of the facts that you determined,
3 did you find conflicting testimony from various
4 sources?

5 MR. FARRAH: Objection.

6 A. That question is a little difficult to answer
7 because there was a major time period between
8 depositions being taken and so forth. So there
9 were differences in the testimonies at various
10 times.

11 Q. And how did you resolve those differences in
12 order to come up with your chronology in this
13 case?

14 MR. FARRAH: Objection.

15 A. Well, specifically in the report that I put
16 together, I found that the second set of
17 depositions that were taken did not really add
18 any additional information. In many instances,
19 the record was unclear and it was -- there was
20 some obfuscation on the record where I was not
21 able to take any additional information. It
22 turns out that I would guess -- and I think I
23 said in the report, the second set of
24 depositions which I guess would be the ones for

25

27

1 the federal court proceeding.
2 Q. This case?
3 A. For this case, were not of any assistance to me.
4 Most of what I relied on were the earlier set
5 that were taken more contemporaneously with the
6 incident itself.
7 Q. Why don't you take a look and make sure I read
8 this properly. Starting at the bottom of page
9 three, I believe you addressed that issue?
10 A. Okay. How far do you want me to go with this?
11 Q. I'll just read it and you tell me if I'm reading
12 it correctly.
13 The very last entry: I have also
14 reviewed the follow-up depositions of Jude
15 Connelly taken February 10, 2006, Michael Espey
16 taken April 25, 2006, and Thomas Scott Espey
17 taken April 25, 2006, and viewed photographs of
18 Jeffrey Southworth taken the day of his arrest,
19 September 27, 2003; is that correct?
20 A. That is an actual reporting, yes.
21 Q. My understanding is you did not find those
22 depositions to be helpful to you at all because
23 of the time delay for some reason?
24 MR. FARRAH: Objection.

1 rendering credibility to various testimony that
2 you weren't present for?
3 MR. FARRAH: Objection.
4 A. I'm not rendering credibility. What I'm doing
5 is I'm first determining whether it sheds any
6 additional light or is consistent with the prior
7 information. And second of all, I'm talking
8 about the semantics of the question-and-answer
9 process rather than the information that was
10 contained.
11 Q. And Mr. Farrah was present at that deposition,
12 correct?
13 A. Say again.
14 Q. Mr. Farrah was present at that deposition,
15 correct?
16 A. I assume so, but I don't recall specifically.
17 Q. So you can't recall what lawyers were at the
18 deposition, but you remember what -- the
19 questions that were cut off and obfuscated?
20 A. I remember that you were asking the questions.
21 MR. FARRAH: Objection.
22 Q. You understand it was Mr. Farrah's deposition?
23 MR. FARRAH: Which deposition are we
24 talking about?

26

28

1 A. For all the reasons I stated earlier.
2 Q. Is there -- I believe you state on the bottom of
3 page four that you found that to be speculative
4 and scanty and could not help you develop in
5 your facts of the night in question a more
6 accurate chronology, correct?
7 A. I would agree with that, sure. That's how I
8 found it.
9 Q. A lot of that is because the prior depositions
10 were taken more contemporaneous with the day of
11 the accident, is that correct?
12 MR. FARRAH: Objection.
13 A. That's only part of it.
14 Q. What's the other part?
15 A. I felt that there was -- I felt that there was
16 some obfuscation of the record. I felt that
17 maybe you were trying to cut off the responses
18 and obfuscate information that was being
19 obtained. It did not appear that you were
20 providing sufficient time for the answers to be
21 rendered and I didn't feel that those were
22 helpful to me is the bottom line.
23 Q. So you're, as part of your expertise in order to
24 make a scientific opinion in this case, you're

1 MR. GILLIS: All of them were yours.
2 A. I don't believe that we're talking about the
3 same thing.
4 Q. Are you aware of any of those depositions that
5 you have listed in this case that were
6 depositions by the defendant, not the plaintiff,
7 in this case?
8 MR. FARRAH: You mean noticed by
9 the --
10 Q. Noticed by the defendants instead of the
11 plaintiffs?
12 A. I really don't know who noticed what.
13 Q. And all of them were noticed by the plaintiff,
14 and Mr. Farrah asked the questions before we
15 even got to ask one question; you're aware of
16 that, aren't you?
17 MR. FARRAH: Objection.
18 A. It's not my recollection.
19 Q. It's not your recollection?
20 A. No.
21 Q. But you do recollect that those aren't
22 trustworthy because the answers provided after
23 Mr. Farrah got through with the witnesses were
24 obfuscated?

29

31

1 MR. FARRAH: Objection.

2 A. That was part of it, yes.

3 Q. Did you put that in your report?

4 A. No. I said --

5 Q. Did you think it was relevant?

6 MR. FARRAH: You did tell him at the

7 beginning you would let him finish answering his

8 questions. At least you tried to. Here's your

9 chance to try to.

10 A. I said in the report that the report was not

11 helpful to me, and provided no additional

12 information. And what was the part that I just

13 read into the record a moment ago?

14 Q. The bottom of page four.

15 A. Most of the testimony scanty and speculative and

16 didn't help me develop a better indication of

17 the facts or a more accurate chronology, I stand

18 by that statement.

19 Q. For the purposes of your opinion, can you name

20 one deposition that you relied upon in this

21 case?

22 MR. FARRAH: For the purposes of his

23 opinion?

24 MR. GILLIS: Yes.

1 A. I reviewed only what I put down, yes.

2 Q. So you didn't review the testimony of the

3 waitress who actually served the drinks in this

4 case, correct? In order to assist you, her name

5 is Leigh Chabot.

6 A. Excuse me, I reviewed the November 2003

7 deposition of Leigh Chabot.

8 Q. You realize there was no deposition of Leigh

9 Chabot in 2003?

10 A. Excuse me, it's her statement then. If it

11 wasn't a deposition; it was a statement.

12 Q. Well, you tell me, was it a deposition or a

13 statement?

14 A. A statement.

15 Q. Did you review her deposition in this case?

16 A. If I haven't listed it here, I did not.

17 Q. Did you think that was important?

18 A. It may have been.

19 Q. May have been?

20 A. Yes.

21 Q. Why didn't you review it?

22 A. I'm not certain.

23 Q. Why didn't you review the bartender's

24 deposition?

30

32

1 MR. FARRAH: Hasn't he put it in the

2 report?

3 MR. GILLIS: Maybe I'm missing it. I

4 don't see any depositions in this case.

5 MR. FARRAH: Page three.

6 A. The bottom of page three. You asked me to just

7 read that into the record a few moments ago.

8 Q. You said you didn't rely upon that because they

9 were too scanty and speculative, correct?

10 A. Right. They didn't add anything over and above.

11 Q. Are there any other depositions that were taken

12 in this case that you have reviewed at all?

13 A. On page three, the depositions mentioned under

14 Documents Reviewed above the last sentence on

15 that page.

16 Q. And none of those depositions are from this

17 case, that's my point?

18 A. That is correct. They're from the earlier

19 proceeding.

20 Q. So other than the ones that you rejected, did

21 you review any other depositions in this case?

22 A. Well, when you say in this case, you mean taken

23 in this case.

24 Q. Yes, taken in this case?

1 A. I'm not certain of that either.

2 Q. Wouldn't that have been important?

3 A. It may have been.

4 Q. Why didn't you review the manager's report --

5 excuse me, the deposition?

6 A. I have no special answer for you.

7 Q. Why didn't you review Sherri Salmon for the

8 waitress who normally served Mr. Southworth at

9 the Longhorn, is there any reason why you didn't

10 review her deposition?

11 A. Never heard that name, to the best of my

12 knowledge.

13 Q. Is there anything that you have requested of

14 Mr. Farrah that he hasn't provided you

15 willingly?

16 A. No.

17 Q. You have written extensively on the importance

18 of a chronology, correct?

19 A. Yes.

20 Q. Don't you think reviewing the people who served

21 the alcohol that night, sworn testimony under

22 oath, would be important in helping you put

23 together that chronology?

24 MR. FARRAH: Objection.

33

1 A. Sometimes.

2 Q. Well, do you know if it was important in this

3 case?

4 MR. FARRAH: Objection.

5 A. It may have been.

6 Q. But you don't know because you didn't bother to

7 take the time to review it, did you?

8 A. Well, I wouldn't phrase it that way. I am not

9 exactly certain why I didn't review them.

10 Q. Normally, when you are preparing to give

11 testimony under oath in the case, those would be

12 the type of documents you would want to review;

13 correct?

14 A. It depends.

15 Q. There are circumstances where you have the

16 bartender's deposition, waitress's deposition,

17 and you don't think you want to review them to

18 see if they're relevant?

19 MR. FARRAH: Objection.

20 A. Sometimes the amount of time that has transpired

21 is so long that there may not be any point to

22 it.

23 Q. But you don't know until you review it, correct?

24 A. Well, the amount of time is the issue. Not

34

1 necessarily what is said that an individual's

2 capacity to recall.

3 Q. Can you tell me how you determined whether or

4 not they had the ability to recall, if you don't

5 bother to even look at their deposition?

6 MR. FARRAH: Objection.

7 A. I don't know how to answer that question.

8 Q. Did you review the plaintiff's Answers to

9 Interrogatories in this case?

10 A. I'm not sure if I did or not.

11 Q. Can you tell me what the relevance of reviewing

12 the statement of facts in a summary judgment

13 motion and the other case, the Southworth case,

14 what relevance that has to this case?

15 MR. FARRAH: Objection.

16 A. It was a document that set forth the summary at

17 that point in time, it was available.

18 Q. By the way, these depositions that you had, you

19 read each one of them?

20 A. I did.

21 Q. Front to back?

22 A. Probably not.

23 Q. So when you say you reviewed the deposition of

24 Michael Espey, we don't know what pages you read

35

1 and what pages you didn't read, correct?

2 A. Right. I can tell you what I did do was look

3 through the deposition to find the testimony

4 that was pertinent about the time interval

5 involved on the evening in question. And

6 reading things about where the person grew up

7 and where they went to high school and things

8 like that were not important to me.

9 Q. What someone like Michael Espey had to drink

10 that night is important, isn't it?

11 A. That's right.

12 Q. Those are the type of things you were looking

13 for?

14 A. That's correct.

15 Q. And you were looking for evidence from them as

16 to visible signs of intoxication, correct?

17 A. Well, I was looking for first, how many drinks

18 were served and what type of drinks were served,

19 and then what their observations were about

20 Jeffrey.

21 Q. Now, based on all of the documents that you have

22 reviewed in order to form your opinion in this

23 case, as well as the conversations and

24 information provided to you by Attorney Farrah,

36

1 what is your opinion as to the visible signs of

2 intoxication that Jeffrey Southworth would show

3 when he was intoxicated prior to the date of

4 this accident which we'll use September 26,

5 2003, even though it went into the morning of

6 the 27th?

7 MR. FARRAH: Objection.

8 A. I really can't answer it in that form.

9 Q. What form can you answer it in?

10 MR. FARRAH: Objection.

11 A. Instead of saying would show, if you say showed,

12 that would help me.

13 Q. Prior to September 26, 2003, based on your

14 review of all the documents in this case, as

15 well as the materials provided you from

16 Mr. Farrah that may not be here, as well as any

17 conversations you have had with Mr. Farrah, what

18 are the visible signs of intoxication that you

19 opine Jeffrey Southworth would exhibit when he

20 was intoxicated?

21 MR. FARRAH: Objection.

22 A. I just said I couldn't answer using that

23 construction. If you ask me what testimony or

24 what statements were made about what he showed

37

1 that particular night, I can answer that
2 question.
3 Q. Okay. I'm going to get to that in a minute. I
4 guess my point is this, based on all these
5 documents, can you make an opinion as to what
6 signs he showed when he was visibly intoxicated,
7 on occasions that he was visibly intoxicated
8 prior to September 26, 2003?

9 MR. FARRAH: Objection.

10 A. I don't have an opinion to that question.

11 Q. Based on these documents, can you tell me what
12 visible signs of intoxication Mr. Southworth
13 exhibited on this evening?

14 A. His eyes were glazed; he was loud; he wasn't
15 carrying himself the way he usually does; and he
16 looked a little unkempt.

17 Q. Okay, when was he loud that evening?

18 A. When the manager or the person at the other
19 table came over and asked them all to quiet
20 down.

21 Q. Is there any testimony that you reviewed that
22 indicated that it was Mr. Southworth solely who
23 was the person that was loud at the table?

24 MR. FARRAH: That he can recall right

38

1 now, you're asking him?

2 MR. GILLIS: That you can recall.

3 MR. FARRAH: Objection.

4 A. I don't recall anything specific.

5 Q. The basis of that, is it your memory that the
6 manager came to the table to speak to the entire
7 table, not specifically to Mr. Southworth?

8 MR. FARRAH: Objection.

9 A. I recall it as talking to everybody at the
10 table.

11 Q. Is it your opinion that if the entire table is
12 loud, all of the people at the table are
13 intoxicated?

14 MR. FARRAH: Objection.

15 A. Not necessarily.

16 Q. Which ones at the table were intoxicated based
17 on the loudness?

18 A. The ones --

19 MR. FARRAH: Objection.

20 A. The ones who drank the most in the shortest
21 period of time.

22 Q. Of the seven people at the table that evening,
23 which ones drank the most and were intoxicated
24 when the table was loud?

39

1 MR. FARRAH: Objection.

2 A. I haven't specifically tried to assign drinks to
3 people other than Mr. Southworth.

4 Q. So how do you opine that the other people were
5 intoxicated due to loudness at the table?

6 MR. FARRAH: The same objection.

7 A. I don't opine that. I just said that the
8 manager came over and told them all to be quiet.

9 Q. According to your report, it wasn't the manager,
10 it was other patrons?

11 A. Or other patrons.

12 Q. There's nowhere in any of the materials you
13 reviewed that said any patron came up to the
14 table that night, isn't that correct?

15 A. I'm not certain that I recall.

16 Q. As you sit here today, you're not aware of any
17 evidence that any patron came up to the table
18 and told him to quiet down that evening,
19 correct?

20 A. Actually, I do recall reading that statement but
21 I may have this case confused with another case.

22 Q. You mentioned it twice in your report so you're
23 telling me you confused this case with another
24 case?

40

1 A. If I mentioned it in the report, then there was
2 some document that stated that.

3 Q. So you indicate on page three that it was so
4 loud, that other patrons had to ask them to be
5 more quiet. Can you tell me what document, if
6 anywhere, you got that from?

7 A. No, I cannot.

8 Q. You said on page two, Other patrons in the
9 Longhorn came over to Southworth's table and
10 asked him and his friends to be more quiet. Do
11 you know where you got that from?

12 A. No, I do not.

13 Q. In fact, you don't mention the manager coming to
14 the table, do you?

15 A. No, I do not.

16 Q. Do you know what time during the evening this
17 occurred?

18 A. I don't recall.

19 Q. Do you remember Jude Connelly testifying in the
20 earlier deposition, the one you found credible,
21 that they left around 11 o'clock; do you
22 remember that?

23 A. Not specifically.

24 Q. Do you remember his testimony that they were

41

1 quiet approximately -- that someone came to the

2 table approximately 25 minutes before they left?

3 A. Would you say that again, please?

4 Q. Never mind, I'll get the page out for you to

5 look at.

6 Page 35 of the Jude Connelly

7 deposition in the Southworth case, on page 39

8 here, line 19 through 22. Can you take a look

9 at that?

10 MR. FARRAH: 39 or 35? Which is it,

11 39 or 35?

12 MR. GILLIS: I'll tell you in a

13 second.

14 THE WITNESS: That's not the right

15 page.

16 MR. FARRAH: 39.

17 Q. Can you tell me what time you left?

18 I would say that it was, if not just

19 before, right around 11 o'clock.

20 These three lines right here. Does

21 that refresh your recollection of what time they

22 left that evening?

23 MR. FARRAH: Objection.

24 A. This is Connelly stating?

42

1 Q. Yes.

2 A. What time he left or what time he thinks he

3 left?

4 Q. Correct.

5 A. Okay.

6 Q. Does that refresh your recollection at all?

7 MR. FARRAH: Objection.

8 A. About what?

9 Q. About what time they left that evening, the

10 restaurant?

11 MR. FARRAH: Objection.

12 A. That isn't what time Mr. Southworth left.

13 Q. Who did Mr. Southworth leave with?

14 A. I don't recall.

15 Q. Okay. So you're not aware that he left with

16 Mr. Connelly, correct?

17 A. I do not recall with whom he left.

18 Q. Okay. I want you to assume that he left with

19 Mr. Connelly. Do you have any opinion

20 whatsoever as to what time they left that

21 evening?

22 MR. FARRAH: Objection.

23 A. Earlier than 11 o'clock.

24 Q. Based on what?

43

1 A. Well, it was, all right -- he had,

2 Mr. Southworth had another beer at 10:30 at a

3 second establishment.

4 Q. Based on what?

5 A. Based on the documents that I reviewed, that

6 they went to another establishment and he had

7 one beer, twelve-ounce beer.

8 Q. You, in order to make your opinion, took a fair

9 amount of information from Jude Connelly's

10 deposition in the Southworth case, correct?

11 MR. FARRAH: Objection.

12 A. A fair amount of information. I took whatever

13 information I needed. I don't know if that's a

14 fair amount or not.

15 Q. So when Jude Connelly says he left there at 11

16 o'clock, you don't believe that?

17 MR. FARRAH: Objection.

18 A. It's inconsistent with other documentation that

19 I found. I chose to accept that there was a

20 second establishment that he went to, and that

21 he had another beer at 10:30.

22 Q. What establishment was that?

23 A. A hotel of some sort, I believe.

24 Q. Do you know of anybody that said they left

44

1 before 10:30?

2 MR. FARRAH: Objection.

3 A. No, I do not. I do not.

4 Q. What is your opinion as to what time they left

5 that evening?

6 MR. FARRAH: Objection.

7 A. It would have to have been before 10:30. The

8 bill was closed at 9:35, I believe, and another

9 round of drinks was issued at that time.

10 I don't believe that it's going to

11 take an hour and a half to sit there and finish

12 one more drink.

13 Q. It's your understanding the bill was closed at

14 9:30 or 9:35?

15 A. 9:35.

16 Q. And that's when they left?

17 A. That's when the bill was closed. And I think

18 that there was at 9:35, another drink was served

19 or ordered.

20 Q. And what you're using to come up to that

21 conclusion, just so we know, is you're looking

22 at your programming of the Widmark, correct?

23 A. Right. I'm looking at the time chronology and

24 the drinks that I put in based on what I was

45

47

1 able to assemble as the best chronology from the
2 documents that I reviewed at the time that I
3 provided this.

4 Q. So when you look at this document and say, Well,
5 it had to be closed out at 9:30, you're going by
6 what your Widmark shows, correct?

7 MR. FARRAH: Objection.

8 Q. You're not reading a deposition here, correct?

9 A. No. I told you that the 9:35 time reference
10 came from the inventory of the service.

11 Q. Okay.

12 A. And the 10:30 came from another independent
13 source.

14 Q. What source?

15 A. That I can't recall.

16 Q. As you sit here today, you don't have any basis
17 for -- you don't have an opinion as to when they
18 left that night, based on all that you reviewed?

19 MR. FARRAH: Objection.

20 A. I don't have a recollection.

21 Q. Doctor, have you ever done a back extrapolation
22 in any case?

23 A. Certainly.

24 Q. Can you tell me what a back extrapolation is?

46

1 A. Yes. A back extrapolation is when you start
2 with the blood alcohol concentration and a known
3 time and you determine that you are in the
4 postabsorptive time of alcohol disposition, and
5 you make an assessment as to what the person's
6 burn off rate is, and you add the amount that
7 was burnt off for each hour to the time that you
8 began with.

9 Q. And so based on what you just told me, in order
10 to do a back extrapolation, you have to have a
11 blood alcohol, you have to know what the blood
12 alcohol is at a certain time point in order to
13 go backwards, correct?

14 A. Certainly.

15 Q. You are unable to do this in this case, correct,
16 because there is no blood alcohol count at some
17 point in the evening?

18 MR. FARRAH: Objection.

19 A. That's right.

20 Q. You're not aware of any case where -- you have
21 been testifying in Massachusetts for quite a
22 while?

23 A. I have.

24 Q. You testify in other states as well?

1 A. I do.

2 Q. How many states have you testified in?

3 A. I don't know, six, eight, ten maybe.

4 Q. Are you aware of any state where you have been
5 able to back extrapolate without having some BAC
6 at a later point in the evening?

7 MR. FARRAH: Objection.

8 A. That's inconsistent with what back extrapolation
9 is.

10 Q. You couldn't do it without that?

11 A. That's correct.

12 MR. FARRAH: Objection.

13 Q. You're not aware of any case in Massachusetts
14 that's allowed that, correct?

15 MR. FARRAH: Objection.

16 Q. Not any legal case, correct?

17 A. I am not.

18 Q. Let's go back to your report and just start at
19 the beginning here.

20 You have the summary of your
21 qualifications and in that, you say that you
22 provide seminars for judges and lawyers and
23 other people, correct?

24 A. I do.

48

1 Q. One of the seminars that you do is a seminar for
2 MCLE on dram shot, correct?

3 A. Yes.

4 Q. In that you discuss, you provide papers and
5 lectures to lawyers on the proper way to
6 determine a blood alcohol based on certain
7 information that you get, correct?

8 A. That's a little vague.

9 Q. Well, what would you describe it as?

10 MR. FARRAH: Objection.

11 A. I would describe that I explain the absorption,
12 distribution, metabolism -- the absorption
13 distribution, metabolism and exclusion of
14 ethanol, and how to do proper ethanol
15 calculations.

16 Q. And is it fair to say in doing your calculations
17 and what you lecture on in these is the use of
18 the Widmark Formula?

19 A. Yes.

20 Q. Can you tell us what the Widmark Formula is?

21 A. Yes. The Widmark Formula is a means of
22 determining a blood alcohol concentration based
23 on the amount of ethanol an individual ingests,
24 based on the person's height and weight, and

49

1 based on the time interval involved.

2 Q. And the lecturing you do for judges on that

3 subject as well as lawyers, you don't have

4 different conclusions for each one, do you?

5 MR. FARRAH: Objection.

6 A. I don't understand what that is asking.

7 Q. We discussed the Widmark with lawyers, you tell

8 them the way you do the Widmark, correct?

9 A. I tell them the way a proper Widmark calculation

10 is supposed to be done.

11 Q. And you would lecture on the proper way to do a

12 Widmark when you lectured to judges as well,

13 correct?

14 A. To anybody.

15 Q. It doesn't matter who the audience is, the only

16 Widmark calculations that you write about and

17 speak about are those that are the proper way to

18 do it, correct?

19 A. Yes.

20 Q. In your summary of qualifications, you talk

21 about seven seminars for judges in Florida,

22 correct?

23 A. Yes.

24 Q. Did those involve the proper use of the Widmark

50

1 Formula, any of those seminars?

2 A. It may be in some small way.

3 Q. Is it fair to say that those lectures didn't

4 deal primarily with the proper calculations

5 under Widmark?

6 A. Well, some of them did, but I found that it was

7 not terribly enjoyed to go through the

8 mathematics; so subsequently, I took a lot of

9 the hard math out of it, and just talked

10 generally about the formula and the manner of

11 calculation.

12 Q. When you teach generally, you basically say a

13 12-ounce beer or four-ounce glass of wine or one

14 and a quarter ounce of 80 proof alcohol all have

15 about the same amount of alcohol content,

16 correct?

17 MR. FARRAH: Objection.

18 A. They do.

19 Q. And not specifics, in generalities, there are

20 about -- they will increase your blood alcohol

21 by .02, is that correct?

22 A. If you want to use just a rule of thumb because

23 it's different from men and women and it's

24 different for body weight, you can use .02 as an

51

1 indicator.

2 Q. And the burn off rate that you generally lecture

3 on, again generalities, is .02, correct?

4 A. Well, actually what I really tell people is the

5 range from .01 to .025, but then using .02 can

6 provide a reasonable estimate.

7 Q. That's what you teach in the MCLE seminars as

8 well, correct?

9 A. That's right.

10 Q. What did you -- you say here that you taught a

11 seminar at Suffolk Law School on the

12 breathalyzer, correct?

13 A. Yes.

14 Q. Did that lecture deal with proper calculations

15 of the Widmark?

16 A. No.

17 Q. The ethanol speech you gave the American Academy

18 of Forensic Scientists and the New Hampshire Bar

19 Association, did those deal with the proper

20 calculations under the Widmark?

21 A. The one at the American Academy of Forensic

22 Sciences, I have given so many that I don't know

23 which one you're referring to.

24 Q. Just the one that you put in your paper here?

52

1 A. Well, I think, why don't you read that to me

2 where it says what I --

3 Q. Spoken on ethanol at the American College of

4 Forensic Science and the New Hampshire Bar

5 Association?

6 MR. FARRAH: No, no, no. Forensic

7 science is parenthesis see resume, close

8 parenthesis.

9 Q. We'll go through the resume, if you want to go

10 through each one.

11 A. All I want to say is, excuse me, that's a

12 general statement. All I said is that I spoke

13 about ethanol at those symposiums.

14 Q. I'm not trying to trick you or anything. I want

15 to find out how many of these things that -- you

16 speak on a lot of things, you speak on the

17 effects of drugs; correct?

18 A. I do.

19 Q. You speak on the topics other than just alcohol,

20 correct?

21 A. Certainly.

22 Q. And I'm trying to find out which one of these

23 that you put in your opinion deal directly with

24 the proper use of the Widmark Formula?

53

1 MR. FARRAH: Objection.

2 A. I can't answer that.

3 Q. Okay. Which one of your peer reviewed articles

4 deal with the proper calculations under the

5 Widmark?

6 A. Well, certainly the one that I gave at the

7 Society for Forensic Toxicology last October

8 did.

9 Q. So October of '06?

10 A. Yes.

11 Q. You gave a lecture to the Academy of Forensic

12 Scientists in which you discussed the proper use

13 of the Widmark?

14 A. No, the Society of Forensic Toxicologists.

15 Q. The society, where was that given?

16 A. Nashville, maybe.

17 Q. Did you provide a paper?

18 A. No, an abstract.

19 Q. Was the abstract published?

20 A. Yes.

21 Q. Where was it published?

22 A. In the proceedings.

23 Q. Is it published anywhere other than -- was this

24 a seminar?

54

1 A. It was a workshop.

2 Q. So you understand that to be a peer review where

3 you published something in a workshop?

4 A. The abstract is peer reviewed by a peer review

5 committee before it's even accepted. If it

6 doesn't pass peer review, it's not accepted and

7 you don't present.

8 Q. And so the society has its own peer review group

9 that reviewed it before you presented it?

10 A. That is correct.

11 Q. Where would I find a copy of that paper?

12 A. I don't know.

13 Q. Well, if it's published, where is it published

14 to?

15 A. In the --

16 Q. Just a workshop?

17 A. In the proceedings of the workshop, yes.

18 Q. It's not in any other volume or periodical?

19 A. No.

20 Q. Just the workshop?

21 A. Yes.

22 Q. Now, on the bottom of the page two of your

23 opinion, you conclude With reasonable scientific

24 certainty that Jeffrey Southworth consumed the

55

1 equivalent of 13 12-ounce beers in 90 minutes;

2 is that correct?

3 A. Yes.

4 MR. FARRAH: Could we just let him

5 have a chance to look at it if he wants to?

6 A. If that's what I said, that's what I said.

7 That's actually the middle-ish, see, so that

8 begins.

9 Q. Is that what you said?

10 A. Yes, I did.

11 Q. Is there a reason why you translate everything

12 into beers as opposed to just putting in the

13 amount of alcohol he drank that evening?

14 A. Yes.

15 Q. Why is that?

16 A. Because I'm translating it to number of drinks

17 is another way of expressing the amount of

18 ethanol, and people are frequently more familiar

19 with how many drinks somebody has.

20 To tell a lay person that a person has

21 a blood alcohol of a certain level may not have

22 exactly the same understandability, or that

23 person may not understand a blood alcohol

24 concentration as opposed to a number of drinks.

56

1 Q. Is there a particular reason for using beer as

2 opposed to wine or one and a quarter ounces of

3 alcohol?

4 A. No. I mean as you pointed out earlier, I could

5 have said 12 four-ounce glasses of wine at

6 twelve percent, or I could have said 12 mixed

7 drinks with one and a quarter ounces of 80 proof

8 spirits.

9 Q. And you conclude to a reasonable degree of

10 scientific certainty certain facts, correct?

11 MR. FARRAH: Objection.

12 A. Well, I don't know what you're referring to that

13 kind of like --

14 Q. One, two, three, four, the fifth line of that

15 paragraph as part of your -- you conclude that

16 he became loud and had difficulty carrying

17 himself in the way he normally did. Correct?

18 A. Yes.

19 Q. You determined that to a reasonable degree of

20 scientific certainty?

21 MR. FARRAH: Objection.

22 A. Based on testimony, yes.

23 Q. But there's no testimony that Mr. Southworth

24 himself was the only person loud at the table,

57

1 correct?

2 MR. FARRAH: Objection.

3 A. No, that's true.

4 Q. The only testimony you have is that the table

5 itself at some point during the evening appeared

6 to be loud, correct?

7 MR. FARRAH: Objection.

8 MR. GILLIS: What's your objection?

9 MR. FARRAH: I think you're

10 mischaracterizing the testimony of the documents

11 that he reviewed.

12 MR. GILLIS: Well, then, he can tell

13 me if I'm wrong.

14 MR. FARRAH: Fine.

15 A. The affidavit of Jude Connelly that was filed

16 the 6th of May 2005, the second page, item five,

17 when he references his own deposition, page 49

18 to 51, he says, I testified -- referring to that

19 deposition -- that during the course of the

20 evening at the Longhorn Steakhouse,

21 Mr. Southworth seemed to be under the influence

22 of alcoholic beverages he was being served at

23 the restaurant.

24 Q. I think we're talking about the loudness. We'll

58

1 get to the restaurant.

2 A. I'm not finished. Item 6 on the same page.

3 Q. Is this concerning loudness?

4 MR. FARRAH: Let him answer. Then you

5 can ask him.

6 MR. GILLIS: If he wants to answer on

7 loudness, I'll let him answer.

8 MR. FARRAH: Otherwise, what are you

9 going to do, interrupt him?

10 MR. GILLIS: Yes, I am, because that's

11 not the question.

12 MR. FARRAH: Let him answer the

13 question.

14 Q. The question is what evidence do you have that

15 Mr. Southworth, not the restaurant, was loud

16 that evening? That is all the question is.

17 A. You don't need to raise your voice to me,

18 Mr. Gillis. I'm going to answer your

19 question --

20 Q. Please do.

21 A. -- right now. Item six. I also testified at

22 pages 42 to 44 of my deposition, that

23 approximately one-half hour before we left the

24 Longhorn, everyone at the table was loud,

59

1 including Mr. Southworth, and that either a

2 waitress or manager of the restaurant came to us

3 and asked us to be quiet.

4 Q. So --

5 A. Let me just add the last statement, then we can

6 move on to your next question.

7 At that time -- this is item seven

8 from the same affidavit -- when the table was

9 asked to quiet down, Mr. Southworth was

10 exhibiting all the signs of intoxication I

11 testified about at pages 49 to 51 of my

12 deposition. Signed under pains and penalties of

13 perjury, the 6th day of May 2005.

14 Q. Okay, so the table was loud, correct?

15 A. As well as Mr. Southworth.

16 MR. FARRAH: Objection.

17 A. You know that statement was right there, I just

18 read it.

19 Q. Are you aware of any independent testimony that

20 just -- that other than the table itself,

21 meaning everybody at the table, was loud?

22 MR. FARRAH: Objection.

23 A. What do you mean by independent testimony? I

24 think this is independent testimony.

60

1 Q. I'm talking about is there anywhere in any of

2 the things that you reviewed that said just

3 Mr. Southworth was loud as opposed to the whole

4 table?

5 MR. FARRAH: Objection.

6 A. It doesn't -- excuse me. Well, to answer your

7 question, I'm sorry. To answer your question,

8 am I aware of that specific statement which you

9 just fabricated and put to me and has no

10 relevance as to what I just stated? No, I'm

11 not.

12 Q. Okay. How do you delineate which of the seven

13 people were intoxicated based on being loud at

14 the table versus those who are loud at the table

15 but weren't intoxicated?

16 MR. FARRAH: Objection to the form.

17 A. Did you say delineate?

18 Q. How did you determine which ones because they're

19 loud or intoxicated, and which ones because they

20 are loud and not intoxicated?

21 MR. FARRAH: Objection.

22 A. How do I determine? I determine because

23 Mr. Connelly made that statement in his

24 deposition. He made that statement and spoke

61

63

1 specifically about Mr. Southworth in this
2 affidavit, and those were credible testimonies;
3 and also consistent with the other statements
4 that Mr. Connelly made about the signs that
5 Mr. Southworth was exhibiting that evening.
6 Q. As a hypothetical, if he said that they left at
7 11 o'clock, that would be around 10:30, 25
8 minutes beforehand that they were loud, correct?

9 MR. FARRAH: Objection.

10 A. I'm sorry, I don't understand what you are
11 asking me.

12 Q. Jude Connelly in that deposition which you have
13 given this weight to --

14 A. Yes.

15 Q. -- to show that signs of loudness were
16 indicative of his intoxication, you testified
17 that they were loud 25 minutes before they left,
18 that's what time you believe they were loud;
19 correct?

20 MR. FARRAH: Objection.

21 A. I'm sorry, that question is far too complicated
22 for me to respond to.

23 Q. I'm going to show you the pages that you
24 referred to in that affidavit. Specifically

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1 page 44, and I'll read the question and the
2 answer and you tell me if I read it correctly.
3 Line 14?

4 A. I can't do so without a copy.

5 Q. Line 14. And giving me your best -- this is
6 Mr. Farrah asking the question -- and give me
7 your best estimate of how much time elapsed from
8 when the woman came over and told you to tone it
9 down and when you left the restaurant on maybe
10 25 minutes, half an hour, is that correct? Did
11 I read that correctly?

12 A. You did read that correctly.

13 Q. Is that your understanding as to when they were
14 loud 25 minutes before they left?

15 MR. FARRAH: I didn't hear the
16 question. Could you repeat the question?

17 Q. Is that your understanding as to when they were
18 loud, 25 minutes before they left?

19 MR. FARRAH: Objection.

20 A. There is no time reference in that. I can't
21 answer reference that.

22 Q. What time reference do you need?

23 A. I need some time reference. I just can't take a
24 statement like that without any qualifier as to

1 time.

2 Q. Do you have any reason not to believe Jude
3 Connelly when he said that the time that they
4 were loud was 25 to 30 minutes before they left,
5 regardless of when they left?

6 A. I don't have any reason to disbelieve that
7 statement.

8 Q. On page 39 of his deposition -- this is again
9 Mr. Farrah asking the question because as you
10 know, we weren't invited at any of these
11 depositions.

12 I can tell you -- can you tell me at
13 what time you left? I would say that it was if
14 not just before, right around 11 o'clock,
15 correct?

16 MR. FARRAH: You read that correctly.
17 Good reading.

18 A. When you say correct to me, you mean in my --

19 Q. Did I read that correctly?

20 A. Yes, you read it correctly.

21 Q. Did you disbelieve Mr. Connelly that that's the
22 time that he left?

23 MR. FARRAH: Objection.

24 A. I don't think that that is correct, no.

1 Q. So you believe him when it suits your purpose,
2 that is, when it's loud, but you don't believe
3 him when he says they left at 11:00, correct?

4 MR. FARRAH: Objection.

5 A. I think that the time -- I think that the timing
6 is incorrect, but I think that he is quite
7 correct when he describes everyone at the table
8 as being loud, and Mr. Southworth is as well.

9 Q. What time do you say they left the restaurant
10 that evening?

11 A. Well, if I'm -- if I knew the distance between
12 the hotel and the restaurant, I could give you a
13 fair assessment, but I would have to say it was
14 after 9:35, minutes after 9:35, because there
15 was still one more drink to consume.

16 Q. How many minutes?

17 MR. FARRAH: Wait. I don't think he
18 finished his answer.

19 A. I've got to --

20 MR. FARRAH: I know you're anxious --

21 A. Let me run this out.

22 MR. FARRAH: -- to depose this man.

23 A. It would have been after 9:35, but it would have
24 been enough time so that they could have gotten

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1 to the hotel. If he had the last beer at around
2 10:30, 10:35, whatever that time was that I had
3 in my note, they would probably have gotten
4 there about 15 minutes before at the latest.
5 So I would say that the time that they left
6 would probably, and this is only inferring by
7 the other standards, sometime, they would have
8 left between quarter of ten and maybe five after
9 ten. Something like that.

10 Q. I'm going to ask you to assume that the hotel is
11 less than a mile away.

12 A. Okay.

13 Q. What is your opinion as to when they left?

14 MR. FARRAH: Objection.

15 A. Then they could have left a little bit later,
16 too. They could have left at 10:10 maybe.

17 Q. Well, what is your opinion?

18 MR. FARRAH: Objection. He just
19 answered your question.

20 MR. GILLIS: No. He said it could
21 have been. I want to know what is your opinion.
22 Not what it could have been; not what it should
23 have been. What is your opinion based on what
24 you reviewed in this case as to when they left?

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1 MR. FARRAH: Please. He is not being
2 asked to give opinions as to when people left or
3 didn't leave an establishment. You have asked
4 questions that are completely objectionable.

5 MR. GILLIS: Because he has given a
6 reasonable scientific certainty to exactly what
7 they drank and when.

8 MR. FARRAH: He doesn't have an
9 opinion as to when they left.

10 MR. GILLIS: That's not true. He does
11 have an opinion because he has them drinking in
12 the hole by 10:30. I want to know the basis of
13 that. When did they leave?

14 MR. FARRAH: Objection, same
15 objection. I think he's answered the question.

16 A. I would say between 10:00 and 10:15.

17 Q. Sometime after 10:00?

18 A. Yes.

19 MR. FARRAH: Objection.

20 Q. What did you base that on?

21 MR. FARRAH: Same objection.

22 A. Based it on what I have stated earlier about the
23 next beer having been consumed at the hotel in
24 the 10:30, 10:35 period of time.

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1 Q. You don't know what you base that statement on,
2 correct?

3 A. Well, I do know that those -- excuse me, those
4 were, the 10:30 was the last beer. Those were
5 based on the documents that I reviewed that were
6 listed in my report.

7 Q. Which document?

8 A. The documents that were listed under Documents
9 Reviewed in my report.

10 Q. I understand, but which of those documents
11 reviewed? You reviewed many.

12 A. I can't tell you. That's right, I did, and I
13 can't tell you which one.

14 Q. When you have a situation like this where Jude
15 Connelly says that he left -- they left at 11
16 o'clock, and apparently somebody else must have
17 said they left earlier because you're saying
18 that person said he had a drink at the hotel at
19 10:30, how do you determine whose statement is
20 more accurate?

21 MR. FARRAH: Objection.

22 A. I try to look at any consistency or
23 inconsistency among all of the documents I
24 looked at.

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1 Q. So there are portions of Jude Connelly's
2 testimony you find credible and other parts of
3 it you don't find credible, correct?

4 MR. FARRAH: Objection.

5 A. Essentially true. I mean credible, excuse me --
6 I don't want to, I have a problem with the
7 credibility part in the sense that people can be
8 mistaken about time, and it doesn't mean that
9 they are deliberately trying to mislead
10 somebody. They're just mistaken and that's in
11 good faith. So I don't want to say that they're
12 not credible.

13 Just saying that when I had to make a
14 final decision on the times that I was going to
15 use, based on the documents on the totality of
16 the documents that I reviewed, and the
17 consistencies and inconsistencies I was able to
18 perceive among them, this was the best
19 chronology that I could come up with.

20 Q. But you have no, you can't tell me which
21 documents you relied upon as to the 10:30
22 statement and why it is so, is that correct?

23 A. You ask one question. I can't tell you the
24 specific document, no, I cannot.

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1 Q. As you sit here today, you can't tell me why you
2 find some other document more credible than what
3 Jude Connelly stated was the time that they left
4 the restaurant?

5 A. No, I can't. But your inference is right,
6 that's what I believed at the time I wrote the
7 report.

8 Q. But you believed Jude Connelly enough that you
9 adopted his statement that the table was loud at
10 some point?

11 A. Well, that's a fact. The statement that you
12 read was that the young lady came over and told
13 them all to be quiet.

14 Q. That's what Jude Connelly testified to?

15 A. All right, okay.

16 Q. Correct? You determined what facts you wished
17 to put in your chronology and which ones you
18 don't?

19 MR. FARRAH: Objection. I think we
20 have pretty much covered that.

21 A. I think I already told you that I agreed with
22 that but I think he was mistaken about the time.

23 Q. How as an expert do you scientifically determine
24 which statements are misspoken and which

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1 statements are accurate?

2 MR. FARRAH: Same objection.

3 A. I think I already answered that by the --

4 Q. Let's go over, starting on page five of your
5 expert report, you mention the Widmark method.

6 MR. FARRAH: Did you say page five?

7 A. Yes.

8 Q. Now, in this chronology you have the first beer
9 drunk by Mr. Southworth as a 12-ounce beer at
10 7:30 p.m., correct?

11 A. Yes, sir.

12 Q. What's the basis for that opinion?

13 A. The testimony that they were out dirt bike
14 riding, I believe, and that was the first beer
15 that they had.

16 Q. You understand that Jude Connelly testified that
17 there was no beer drank that he was aware of,
18 correct?

19 MR. FARRAH: Objection.

20 Q. In the deposition that you found credible, the
21 first deposition?

22 A. I don't have an independent recollection of that
23 at all.

24 Q. Okay. Well, if he didn't -- do you know what

1 time Jude Connelly said they stopped dirt biking
2 that night?

3 A. Yes, sometime before 7:30.

4 Q. Sometime before 7:00, correct?

5 MR. FARRAH: Objection.

6 A. 7:00 is before 7:30.

7 Q. What time do you believe they stopped dirt
8 biking that night?

9 MR. FARRAH: Objection.

10 A. Sometime before 7:30.

11 Q. How far before 7:30?

12 A. I can't tell you specifically.

13 Q. How long did it take them to get from there to
14 the Longhorn?

15 A. If -- at least a half an hour, approximately
16 half an hour.

17 Q. At least a half an hour?

18 A. From 7:30. They got there around eight o'clock.

19 Q. So in order to get there by eight, if it took 30
20 minutes, they would have had to finish their
21 beers sometime before 7:30, correct?

22 A. I don't think -- first of all, I don't know who
23 they is. I know Mr. Southworth had a beer.

24 Q. He would have had to have finished it by 7:30 in

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1 order to drive 30 minutes to the Longhorn and
2 get there by eight o'clock, correct?

3 MR. FARRAH: Or drank it as he drove.

4 MR. GILLIS: Thank you, Mr. Farrah.

5 Do you want to testify?

6 A. Is there not a possibility that he took the can
7 into the car with him and drank as they were
8 going? Of course.

9 Q. I'm asking you what's your opinion: Did he
10 drink in the car?

11 MR. FARRAH: Objection.

12 A. The answer is that it's immaterial whether he
13 drank in the car or whether he drank before he
14 got into the car. The fact is whether or not he
15 had a beer and whether or not I have included it
16 in the summary of the ingestions, and I have.
17 Where he drank it doesn't make any difference.

18 Q. But the time he drank it does?

19 A. The time is important in some capacity. But it
20 isn't extremely important.

21 Q. Well, if he had that beer at seven o'clock and
22 his blood alcohol at the time he got to the
23 restaurant would be zero, not .01, correct?

24 A. It would be below .016. It may not be zero but

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1 it would be very low, you're absolutely right,
2 very low.
3 Q. That would have an effect on the calculations as
4 to what you find his blood alcohol to be when he
5 was served his last drink?
6 MR. FARRAH: Objection.
7 A. Not really. Because by then, it certainly is
8 gone from his body.
9 Q. I want you to assume that Mr. Connelly testified
10 that they stopped somewhere between 6:00 and
11 7:00, and assuming that, what time do you opine
12 that he had his last beer that night?
13 A. Then between 7:00 and 7:30.
14 MR. FARRAH: You mean his first beer?
15 Q. First beer.
16 A. First beer, thank you.
17 Q. And if it was closer to 7:00, it would have been
18 almost all burnt off before he got to the
19 Longhorn, correct?
20 A. Yes.
21 Q. The second beer you attribute to him is one
22 25-ounce Bud Light at 8:10, correct?
23 A. Yes.
24 Q. How do you come up with 8:10?

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1 A. Their testimony was that they arrived at the
2 Longhorn approximately eight o'clock and that
3 they went over to the bar. And I'm figuring
4 that if you order a drink and it's a busy night,
5 it may take you five to ten minutes to get
6 served.
7 Q. That's your assumption?
8 A. I think it's a reasonable assumption.
9 Q. What is your assumption for him having another
10 beer at 8:20?
11 A. That there was testimony that they -- that he
12 had two beers at the bar prior to having been
13 seated. I think that's seated, I can't tell you
14 specifically.
15 Q. You don't know the basis of that opinion as you
16 sit here today?
17 A. I don't recall specifically.
18 Q. Did you review the deposition of Michael Espey?
19 A. I believe I did.
20 Q. Did you find it to be credible?
21 A. Gee, you know, I reviewed these so long ago,
22 that I don't have any independent -- that's why
23 you're asking all these questions. I just don't
24 have all those independent facts at my disposal

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1 to it.
2 Q. So you don't have, for purposes of your
3 deposition today, you don't have the basis for
4 your opinion that he had two beers at the bar?
5 MR. FARRAH: I'm sorry, I didn't -- I
6 just didn't hear the beginning of that question.
7 Could you repeat the beginning?
8 A. For the purposes of your deposition.
9 Q. I'll ask it a different way. As you sit here
10 right now as an expert in this case, you can't
11 tell me what was the basis for your opinion,
12 what data or testimony you relied upon in coming
13 to the conclusion that he got a second beer at
14 the bar at 8:20?
15 A. That's not correct.
16 Q. What is it?
17 A. The information that you're seeking would be
18 within those documents that were described under
19 Documents Reviewed, if we pulled all those
20 documents out and went through them.
21 Q. You can't tell me which one it is?
22 A. That is correct.
23 Q. They sat down at 8:40, correct?
24 A. Approximately.

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1 MR. FARRAH: Objection.
2 Q. Well, we know that they sat down because the
3 audit report shows an input of food and drinks
4 at 8:41, correct?
5 A. Yes.
6 Q. Is it your opinion that they sat down by 8:40?
7 MR. FARRAH: Objection.
8 A. I think the testimony was that they were seated
9 approximately 8:30, and what you're referring to
10 is the time the waitress comes over and actually
11 takes the first drink order, and then records it
12 on the computerized ordering system. So we're
13 not really disagreeing here, Mr. Gillis.
14 Q. So you have him ordering a beer at 8:20, getting
15 it served, drinking it, and having it all done
16 before he went and sat down at 8:30?
17 A. I have him ordering a second beer. We're
18 talking about the second beer.
19 Q. It's your testimony, to a reasonable degree of
20 scientific certainty, that he had a beer at 8:20
21 and was able to drink a 25-ounce beer and finish
22 it and get to the table by 8:30, is that your
23 testimony?
24 MR. FARRAH: Objection. You can

77

1 answer.

2 A. The fact that he started the second beer at 8:20

3 doesn't necessarily mean that he finished it by

4 the time they sat down.

5 Q. Are you aware of any testimony that he brought

6 the beer with him to the table?

7 A. I am not.

8 Q. And did you review the deposition of Leigh

9 Chabot?

10 A. I reviewed nothing before I came to this

11 deposition today.

12 Q. Wouldn't that be important if the server said

13 the first round of drinks -- don't you think

14 it's important that the server testified that

15 that first round of four drinks was served to

16 those people who didn't come from the bar

17 because the other three brought their drinks

18 from the bar?

19 A. What I had to go on at the time was what I

20 utilized. And she was -- she testified as best

21 she could, but there were other things that I

22 relied on as well.

23 Q. How do you know how she testified if you never

24 looked at it?

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1 A. Well, maybe I'm confusing the witness statements

2 with the depositions. You may absolutely be

3 correct.

4 Q. I'm going to ask you to assume that the four

5 drinks -- you have the audit report in front of

6 you, correct?

7 A. I do.

8 Q. And the audit report has been premarked as

9 Exhibit 4 in this case. And you have at 8:45,

10 four drinks that were being ordered, correct?

11 A. At 8:40? Is that what you said?

12 Q. The bottom of the page.

13 A. Okay. I'm in the wrong page here. Yes, three

14 Jack Manhattans and a Bud, a large Bud.

15 Q. Now, your understanding of the facts of this

16 case is that there were three people at the bar

17 before they sat down, correct?

18 A. My understanding is that there were two people.

19 Q. You only have two people at the bar before they

20 sat down?

21 A. Yes. Mr. Southworth and his dirt bike riding

22 friend.

23 Q. Espey and nobody else?

24 A. Those are the two I know.

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1 MR. FARRAH: Objection to Mr. Espey,

2 nobody else.

3 Q. Who was at the bar, to the best of your

4 recollection, before the group sat down at the

5 table?

6 A. I have no knowledge of people other than Jeffrey

7 Southworth and the fellow that he came in with.

8 Q. Do you know what that fellow's name is?

9 A. No.

10 Q. Two people, correct?

11 A. Yes.

12 Q. And what is your understanding as to how many

13 people sat at the table?

14 A. Gee, I don't really recall.

15 Q. Well, isn't that important in order to assign

16 drinks to people, to know how many people are

17 sitting at the table?

18 A. Not really.

19 Q. Okay. I want you to assume that Ms. Chabot

20 testified under oath on questions asked to her

21 by Mr. Farrah, that four gentlemen came in that

22 were not at the bar and that the first round of

23 drinks was served to those four gentlemen?

24 A. The first round of drinks at the bar or at the

80

1 table?

2 Q. At the table, there's three Manhattans and the

3 Bud Light?

4 A. All right. Now say that to me again, please?

5 Q. I want you to assume that in the deposition of

6 Ms. Chabot, she said when the group of gentlemen

7 sat down at the table, there were four gentlemen

8 who sat down who did not come from the bar, and

9 those are the four that ordered those drinks. I

10 want you to assume that, the three Manhattans

11 and the Bud Light?

12 A. Okay.

13 Q. Does that change your opinion in any way as to

14 what Mr. Southworth had to drink at the table

15 that evening?

16 MR. FARRAH: Objection.

17 A. No.

18 Q. No?

19 A. No.

20 Q. Well, in your opinion, you say that

21 Mr. Southworth drank that Bud Light in that

22 first round, correct?

23 MR. FARRAH: Objection.

24 A. He drank two Bud, he drank two Bud Lights before

81

1 he sat down.

2 Q. At the table, you said he had two Bud Lights in

3 your opinion, correct?

4 MR. FARRAH: Can he look at his

5 opinion?

6 MR. GILLIS: Sure, he can. He's got

7 it right in front of him.

8 Why don't we take a two-minute break?

9 VIDEO OPERATOR: The time is 1:36

10 p.m., and we're now off the record.

11 (Recess.)

12 Q. On the top of page 6 --

13 VIDEO OPERATOR: Stand by. The time

14 is now 1:47 p.m. and we are now back on the

15 record.

16 Q. On the top of page 6 of your expert opinion in

17 this case, you, as part of your chronology, give

18 a 25-ounce beer to Mr. Southworth, and then you

19 have parenthesis check 20043, correct?

20 A. Yes.

21 Q. Is that the beer that was ordered at 8:40?

22 A. Yes.

23 Q. But the only testimony is that -- are you aware

24 of any testimony that the server brought that

82

1 first round of drinks to Mr. Southworth as

2 opposed to the four gentlemen who just showed up

3 at the restaurant?

4 MR. FARRAH: Objection.

5 A. No.

6 VIDEO OPERATOR: Counsel.

7 MR. FARRAH: Sorry.

8 Q. I want you to assume that Leigh Chabot has

9 testified that four gentlemen came in who were

10 not coming from the bar and those were the four

11 that got the drinks as they came -- that was in

12 the first round of drinks that night. Does that

13 change your opinion in any way?

14 MR. FARRAH: Objection.

15 A. No.

16 Q. Why not?

17 A. Because apparently when I put this chronology

18 together, that was the conclusion that I drew.

19 Q. Apparently?

20 A. Or I wouldn't have put it down.

21 Q. How did you conclude it?

22 A. It had to be from the other documents that I

23 listed as documents that I reviewed.

24 Q. You don't know which specific one?

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1 A. No.

2 Q. What are you charging for this deposition today?

3 A. \$650 an hour.

4 Q. You knew when you came here I would be asking

5 you questions about this case, correct?

6 A. I did.

7 Q. And at \$650 an hour, you didn't think it

8 important enough to review your documents so

9 that you would have answers as to how you based

10 your opinions?

11 MR. FARRAH: Objection.

12 A. Well, I don't think that that's a fair

13 characterization. I anticipated being able to

14 talk about the Widmark calculations and the

15 composition of the drink. And there were so

16 much conflicting testimony among the people who

17 had testified, and with the several cases and

18 the witness statements and so forth, that I had

19 to use my best judgment when I put this

20 together. And that's what I did.

21 Q. And that best judgment that you used -- by the

22 way, you have already charged \$6,600 in this

23 case before you got to the deposition, correct?

24 A. I don't have a recollection as to what I have

84

1 been paid. There's something in the Rule 26

2 report about what I have been paid.

3 Q. Whatever it is, that's what you have been paid

4 to date?

5 A. That would be true.

6 Q. And based on all of that, you can't tell me the

7 basis of your chronology?

8 A. No.

9 MR. FARRAH: Objection.

10 Q. Now, you just testified that there's a lot of

11 conflicting testimony, correct?

12 A. Yes.

13 Q. How did you determine facts to a reasonable

14 degree of scientific certainty when you yourself

15 say that there's a lot of conflicting facts in

16 the case?

17 MR. FARRAH: Objection.

18 A. When I reviewed the documents, I had all the

19 documents laid out and highlighted and yellow

20 stickered. I went through them, and I put

21 together what at that time was scenario that was

22 the most likely to have occurred at that time.

23 Q. The most likely to have occurred?

24 A. Right. And if I had any questions about what

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1 had occurred, I asked plaintiff's counsel about
2 how to interpret those documents and how he
3 would be putting the hypothetical question to me
4 in court.

5 Q. So if there was a problem with the chronology,
6 you asked plaintiff counsel to tell you what
7 chronology to use for purposes of the
8 hypothetical?

9 A. Right.

10 Q. So if the waitress says, I served the four
11 people who just came in from outside the
12 restaurant those drinks, and Mr. Farrah told you
13 to attribute that drink to Mr. Southworth, you
14 attributed that drink to Mr. Southworth,
15 correct?

16 A. Most likely.

17 MR. FARRAH: Objection. You can
18 answer.

19 Q. So is the chronology drawn up by you or by
20 Mr. Farrah?

21 A. By me.

22 Q. Whenever there's a question, you get what you
23 need for a hypothetical from Mr. Farrah,
24 correct?

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1 A. Yes.

2 Q. Is it fair to say that your expertise is in
3 determining the blood alcohol based on the
4 chronology that you are given?

5 MR. FARRAH: Objection.

6 A. My expertise is in taking the set of scenario or
7 set of circumstances with a given number of
8 drinks and then calculating what the blood
9 alcohol would be under that set of
10 circumstances.

11 Q. Then why do you need Mr. Farrah to give you
12 anything in the chronology?

13 MR. FARRAH: Objection.

14 A. Because at that time, there were things that I
15 might not have been able to fit in. As a matter
16 of fact, there are still inconsistencies as
17 you're pointing out right now.

18 Q. How much of the chronology was prepared, based
19 on the input from Mr. Farrah, as to the
20 hypothetical he would ask you?

21 MR. FARRAH: Objection.

22 A. I can't really answer that.

23 Q. So you don't know what part of your chronology
24 is based on your determining what you believe to

1 be the facts, and what Mr. Farrah has told you
2 to assume for purposes of his hypothetical?

3 MR. FARRAH: Objection.

4 A. That is correct.

5 Q. And when you said earlier in your deposition
6 that you took the information that you needed,
7 what do you mean by that?

8 A. I took the information about the type of drink
9 and the time that they were served, that's what
10 I needed.

11 Q. Now, if the drink was ordered at 9:40, why do
12 you have it coming at 9:15?

13 MR. FARRAH: 8:40.

14 Q. 8:40, I'm sorry.

15 A. Because one, there's a time for ordering a drink
16 and one is for serving the drink.

17 Q. When you do your Widmark calculations, you don't
18 put the drink in when it was ordered, you put it
19 in at some other time?

20 A. Well, when a person orders a drink, they don't
21 have it in front of them.

22 Q. So that wouldn't be the appropriate time to put
23 it in for purposes of calculating, correct?

24 A. It gives you a window of, say, five to ten

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1 minutes, and whatever amount of time it takes
2 for the waitress to bring the drink over.

3 Q. How did you choose the times that you determined
4 from when it was ordered to when it was served
5 and drank?

6 A. I use a reasonable time interval, such as five
7 or ten minutes.

8 Q. Do you use the same time or do you switch it
9 around?

10 A. You mean in this case or in all cases?

11 Q. In this case.

12 A. I tried to make what is reasonable time
13 assessment.

14 Q. How do you go about figuring out what is
15 reasonable?

16 A. Just from my experiences and from having been in
17 the restaurant business myself.

18 Q. When you find out -- in this particular, you
19 find out what's reasonable and you stick with it
20 throughout or you change it as it goes along?

21 MR. FARRAH: Objection to the form.

22 A. If I get better information or something else
23 that would change my chronology, I would change
24 it.

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1 Q. What information, if any, do you have on
2 materials that you reviewed that talks about the
3 intervals between when the drink was ordered and
4 when it was actually served?
5 A. I don't recall having any specific information
6 about it.
7 Q. So this is just a guess you made when you said
8 it was ordered at 8:40, you guessed that it took
9 ten minutes to get to the table?
10 MR. FARRAH: Objection.
11 A. No, I estimated.
12 Q. Based on what?
13 MR. FARRAH: I think you have asked
14 him that already.
15 A. Yes.
16 Q. Let me ask it again. Are there any facts in
17 this case that you have determined from all of
18 the materials that you reviewed that allow you
19 to conclude that the drink came ten minutes
20 later?
21 A. Are there any specific facts that have been
22 testified to?
23 Q. Yes.
24 A. There aren't specific facts as to the time but

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1 there are -- it takes a certain amount of time
2 to mix several martinis or Manhattans. It takes
3 a certain amount of time to walk over to the
4 bar, to put in the order, to have the bartender
5 make them, to draw the beers, to bring them
6 back; so a five- or a ten-minute interval is a
7 perfectly reasonable estimate.
8 Q. That's an estimate you made not based on any
9 facts that you gleaned from the materials in
10 this case?
11 A. That's correct.
12 Q. And how did you determine in that first round
13 that if Mr. Southworth got a drink, it was the
14 beer and not one of the three Manhattans?
15 A. I had to assume that based on Mr. Farrah's
16 input.
17 Q. Mr. Farrah told you to give him the beer in the
18 first round, correct?
19 MR. FARRAH: Objection.
20 A. Yes.
21 Q. You're aware a 25-ounce beer has more alcohol
22 than a Manhattan, correct?
23 A. Well, it would depend upon the alcohol
24 concentration, and it would depend upon the

91

1 circumstances, but as I calculated it in this
2 situation, a 25-ounce beer had a little bit more
3 than a Jack Manhattan.
4 Q. Now, you then have food being ordered at nine
5 o'clock, correct? According to your chronology
6 on the top of page six of your report.
7 A. Yes, sir.
8 Q. In fact, food was ordered at 8:40, wasn't it?
9 Based on the audit report?
10 A. Well, there were some appetizers ordered at 8:40
11 but there were -- the main courses were ordered
12 later on.
13 Q. Well, there was also bread served at 8:40,
14 correct, from Ms. Chabot?
15 A. I don't know about bread but I have at 8:40
16 union soup and chowder and like chicken fingers
17 being ordered. At nine o'clock, I have the
18 steaks and the ribs and the heavier food.
19 Q. What effect would the appetizers have on the
20 alcohol absorption that evening?
21 MR. FARRAH: You mean assuming that
22 Southworth had had them?
23 MR. GILLIS: Yes.
24 MR. FARRAH: Objection.

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1 A. The appetizers would have a minimal effect on
2 slowing down the rate of absorption, and the
3 food would have a significant effect.
4 Q. How much effect would the appetizers have?
5 MR. FARRAH: Objection. He just
6 answered a minimal of.
7 Q. Give me specifics. Would it make it from 30 to
8 45 minutes? 30, 40, 60 minutes, what would it
9 do?
10 MR. FARRAH: Objection.
11 A. It probably wouldn't change it too much
12 actually. Maybe a small amount.
13 Q. Don't you normally teach people in the proper
14 Widmark formulations that if they're having
15 food, it makes the absorption time 60 minutes,
16 even if it's appetizers?
17 A. I never said appetizers or specifically. I said
18 that food will slow down the absorption rate.
19 And if you look at my calculations, you'll see
20 that I did do just exactly what you said.
21 I changed the absorption time from 30
22 to 60 minutes starting at 9:20, which would be
23 the amount of time that it would take for
24 somebody who was starting to eat some material

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95

1 around nine o'clock, or maybe even a few chicken
2 fingers or small amount before, to have it in
3 their stomach.

4 Q. 40 minutes after it was ordered, you changed the
5 time, is that correct?

6 MR. FARRAH: Objection.

7 A. 20 minutes. 9:20.

8 Q. It was ordered at 8:40?

9 MR. FARRAH: Objection.

10 A. The appetizers were ordered at 8:40. The larger
11 meal was ordered at 9:00 and then there was some
12 reference as to when it was actually served.

13 Q. Do you remember writing an article for MCLE in
14 2006?

15 A. Sure.

16 Q. Do you remember giving a hypothetical in that as
17 to how food is absorbed?

18 A. Why don't you show me what you're referring to?

19 Q. I will. Why don't you start at the bottom of
20 page 97? They talk about a hypothetical where a
21 gentleman arrives at a tavern at one o'clock and
22 he has a 12-ounce Bud Light and some buffalo
23 wings.

24 MR. FARRAH: Let me just look on. You

94

96

1 want him to read something here, is that right?

2 MR. GILLIS: He wanted to see his
3 article, there it is.

4 MR. FARRAH: I don't think he said he
5 wanted --

6 A. I'm asking what --

7 MR. FARRAH: What do you want him to
8 do?

9 Q. I'm directing you to look at that and on the
10 next page to look at your hypothetical.

11 MR. FARRAH: I'm just reading it to
12 myself.

13 Q. Do you see that hypothetical?

14 MR. FARRAH: We haven't finished
15 reading it, or at least I haven't finished
16 reading it.

17 Is this, by the way, what you gave me
18 and then took away since you're asking him to
19 read it.

20 MR. GILLIS: It was a good idea and I
21 took it away.

22 MR. FARRAH: Okay.

23 Q. This is your writing, correct, Dr. Benjamin?

24 A. It is.

1 Q. This is what you prepare for lawyers and judges
2 as to the proper formulation of the Widmark?

3 A. Right.

4 MR. FARRAH: Objection.

5 Q. In your chronology, by the way, you stress
6 emphatically that the chronology is key in these
7 cases, correct?

8 A. Chronology is important, yes.

9 Q. You have given papers on the importance of the
10 chronology, correct?

11 A. I have.

12 Q. And in your chronology, you have at one o'clock,
13 you gave it ordering 12-ounce Bud Light and some
14 buffalo wings?

15 A. Yes.

16 Q. In your Widmark -- strike that.

17 Going back to the chronology, there is
18 no other food until 3:30 when there is a burger
19 and some fries, correct?

20 A. Yes.

21 Q. Yet that Widmark, you have an absorption rate of
22 60 minutes starting at one o'clock and
23 continuing on beyond the time of the burger
24 being ordered, correct?

1 A. That is correct.

2 MR. FARRAH: Objection.

3 Q. And that is what you teach people, is that when
4 you get something as simple as buffalo wings,
5 that the absorption time is 60 minutes, not 30,
6 correct?

7 A. You are mixing apples and oranges here,
8 Mr. Gillis.

9 Q. How am I mixing apples and orange?

10 A. In this hypothetical, it's one person consuming
11 all of the buffalo wings. In the case that
12 we're involved in, there are seven people at the
13 table sharing all of the appetizers. So people
14 are eating a couple of pieces of appetizers each
15 and some of --

16 Q. Go ahead.

17 A. That's all. That there are seven people here
18 who are sharing the appetizers. And in this
19 situation, the person is by himself eating all
20 the buffalo wings. When the person is by
21 himself eating all the buffalo wings, I think
22 it's appropriate to start with a 60-minute
23 absorption time; when people are eating less and
24 I think it's appropriate to start with a 30

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1 absorption time, and then move it to 60 as more

2 food is ingested.

3 Q. Which of the appetizers did Mr. Southworth eat?

4 A. I don't know. I gave him the benefit of the

5 doubt by elongating the interval regardless.

6 Q. Who had the chowder?

7 A. I don't know that either.

8 Q. Who ate the tunion?

9 A. The what?

10 Q. The tunion. Look at your report, top first

11 thing ordered is a tunion.

12 MR. FARRAH: Is that in his report?

13 MR. GILLIS: Excuse me, the audit

14 report.

15 MR. FARRAH: Where is it in this

16 report?

17 A. I see it.

18 MR. GILLIS: I said in the audit

19 report.

20 Do you want me to say it again, AI?

21 The audit report.

22 A. Tunion.

23 Q. Who ate that?

24 A. I don't know.

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1 Q. What is it?

2 A. Tunion. I thought it was union soup.

3 Q. So you don't even know what it is?

4 A. No.

5 Q. How big is it?

6 A. I don't know.

7 Q. Is it big enough to feed a whole table?

8 A. Well, I don't know, but the fact that I --

9 Q. Who ate the chicken fingers?

10 A. The fact that I used the 60 actually is the

11 right thing to do at that point in time. It's

12 not going to have any effect initially, and then

13 subsequently as it increases in the stomach,

14 then it's going to have an effect.

15 If he didn't eat it, if Mr. Southworth

16 did not eat any of those appetizers, then I

17 should go back and make that 30 instead of 60;

18 and then the blood alcohol will be even higher

19 faster.

20 Q. You didn't assign the 60 until 20 minutes after

21 the main meal was ordered, correct?

22 A. Yes.

23 Q. After the salads were served, correct?

24 MR. FARRAH: Objection.

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1 A. Yes, salads.

2 Q. After all the chowder was served, correct?

3 A. Yes.

4 Q. After the chicken fingers were served, correct?

5 A. Yes.

6 Q. After the tunion was served, correct?

7 A. Yes.

8 Q. And you are now saying that that 60 is

9 inappropriate at 9:40 -- 9:30 when you put it

10 in?

11 MR. FARRAH: Objection.

12 A. No. All I'm saying is that if Mr. Southworth

13 didn't eat any of those appetizers, then I

14 should have used a shorter absorption, which

15 would have made it higher. As it is, I used a

16 longer absorption which favors your client.

17 Q. The Widmark, for an empty stomach, is 30,

18 correct? 30 minutes absorption time?

19 A. I used 30 minutes.

20 Q. It's actually 30 to 45, according to the

21 Widmark, correct?

22 A. Well --

23 MR. FARRAH: Objection.

24 A. It's actually, the statistics are that by 30

100

1 minutes, you reach peak on an empty stomach. It

2 would certainly depend upon what was drank. You

3 can't make a statement that it's 30 to 40

4 minutes because our -- taking a shot and

5 drinking a mixed drink or drinking a beer with

6 the same amount of alcohol have different

7 volumes and they're different concentrations.

8 Q. You gave no weight whatsoever to any of the

9 appetizers?

10 A. I didn't give much weight to the appetizers.

11 Q. You gave zero, correct?

12 A. Right.

13 Q. Don't you think that it would have had some

14 effect on the absorption rate?

15 A. Perhaps.

16 Q. Perhaps?

17 A. Yes.

18 Q. There was six salads and appetizers served to

19 the table, and you say perhaps it might have

20 some effect?

21 MR. FARRAH: Objection.

22 A. Yes.

23 Q. So what effect would it have?

24 A. The answer is it depends truly on the

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1 interaction between how much food and how much
2 alcoholic beverage was ingested at that time,
3 and there's really --
4 Q. How much bread did he eat?
5 A. There's really not any way to be able to figure
6 all of that out.
7 Q. What you are saying, between the time the food
8 was ordered at 8:45 and until you changed your
9 consumption to 60 minutes?
10 A. 9:20, was it?
11 Q. 9:20, for that 40 minutes, you're unable to
12 determine what effect, if any, the appetizers
13 and bread that he may have eaten had on this
14 absorption rate?
15 MR. FARRAH: Objection.
16 A. First of all, you haven't demonstrated nor has
17 anybody else that he ate any of that, to begin
18 with. So I made an assessment that I thought
19 was fair.
20 Q. Was that your assumption or is that an
21 assumption Mr. Farrah agreed you to take?
22 A. Those are my assumptions.
23 Q. So your assumption is he didn't have anything to
24 eat prior to 9:20?

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1 A. No, I didn't say that. What I did say was that
2 the effect would be a negligible effect.
3 Q. So tunions, salads, chowders, bread, have no
4 effect, but buffalo wings have an effect
5 immediately, is that your testimony?
6 MR. FARRAH: Objection.
7 A. No. In the other scenario, there was one person
8 eating. In this situation, there are a number
9 of people sharing the appetizers, and then the
10 salads came, then the heavier food came.
11 Q. Now, there is another beer ordered to the table
12 at 9:15, correct?
13 A. Yes.
14 Q. And at this point, we know that appetizers had
15 been brought to the table, correct?
16 MR. FARRAH: Objection.
17 A. Yes.
18 Q. And at that point, we know that according to
19 your chronology, you already ascribe to him a
20 25-ounce Bud Light, correct?
21 A. Yes.
22 Q. You have here that Bud Light coming?
23 A. 9:20.
24 Q. 9:20, correct, thank you. Tell me the facts and

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1 basis of your opinion that this round he was
2 able to get the beer in five minutes, when the
3 last round it took ten minutes?
4 MR. FARRAH: Objection.
5 A. When I looked at the subsequent drinks that he
6 had, the next Jack Daniels Manhattan and the
7 third Jack Daniels Manhattan after the 9:20 Bud,
8 there were so many drinks in that 15-minute
9 period that what I tried to do was spread them
10 out into a reasonable interval, dividing the
11 time interval into separate time periods.
12 Because there were so many drinks that were
13 served in that short period of time, that at
14 that point in time, I was more concerned with
15 trying to spread them out in a reasonable way
16 rather than specifically relate them to the time
17 of order and the time that they were delivered
18 to the table.
19 Q. So it's not based on any actual testimony in
20 this case, it's something that you assigned to
21 it, correct?
22 MR. FARRAH: Objection.
23 A. It's something I assigned to it, exactly right.
24 Q. I'm correct, am I not, that as far as you're

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1 aware, there are only two 25-ounce beers that
2 were brought to the table that evening, correct?
3 MR. FARRAH: Objection.
4 VIDEO OPERATOR: Five minutes
5 remaining, counsel.
6 A. I think that's right.
7 Q. Well, you're aware that Michael Espey drank one
8 of those two beers, correct?
9 MR. FARRAH: Objection.
10 A. I'm not aware of that.
11 Q. You're not?
12 A. No.
13 Q. Isn't that your conclusion?
14 MR. FARRAH: His conclusion, did you
15 say?
16 MR. GILLIS: Yes.
17 MR. FARRAH: Objection.
18 A. From where?
19 Q. Didn't you sign an affidavit saying that he had
20 it?
21 A. If I did, I did.
22 Q. Okay. Why don't you --
23 MR. FARRAH: Show him, show him.
24 Q. Exhibit 3 on the affidavit is your affidavit in

105

1 this case, correct?

2 A. It is.

3 Q. I want you to go to paragraph three on the

4 bottom of page seven.

5 A. There's no paragraph three.

6 Q. 23, sorry. Do you see the paragraph?

7 A. I do, you're talking about item 23.

8 Q. Yes. You said he was served, the last line, at

9 least a Manhattan and a beer at the Longhorn

10 that evening, correct?

11 MR. FARRAH: Do you want to read it?

12 A. Sure, I'll read it. Item 23 says, Mike Espey,

13 another member of Southworth's party that night,

14 started drinking alcoholic beverages at 4:00 or

15 5:00 in the afternoon. Despite that, in his own

16 words, he was drunk. Espey deposition page 26.

17 While at the Longhorn Steakhouse, he was served

18 at least a Manhattan and a beer.

19 Q. You based your opinion on that, correct?

20 MR. FARRAH: Objection.

21 A. Well, that was what he said.

22 Q. You based your opinion on it, did you not?

23 MR. FARRAH: Objection.

24 A. No, I don't think my opinion includes that.

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1 Q. Okay, go to page five, paragraph nine.

2 MR. FARRAH: Of what?

3 MR. GILLIS: Of that same document.

4 Q. Tell me if I read this correctly.

5 From my review of these materials, I

6 have relied upon the following relevant

7 background facts on which I base my opinions.

8 Is that what you said under oath in this

9 affidavit?

10 A. Okay. That was what I said at the time the

11 affidavit was filed, yes.

12 Q. So that was under the pains and penalty of

13 perjury, correct?

14 A. Yes, it was.

15 Q. And that was based on all of the documents that

16 you had reviewed in order to make this

17 affidavit, correct?

18 A. Yes.

19 Q. And your opinion, after basing it on all that,

20 to a reasonable degree of scientific certainty

21 was that Michael Espey had a beer and a

22 Manhattan, at least a Manhattan, a beer, at that

23 table that evening?

24 MR. FARRAH: That's not what it says.

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1 What he says here that's a relevant background

2 fact on which he based his opinion.

3 Q. Did you base your opinion on Michael Espey being

4 served at least a Manhattan and a beer at the

5 Longhorn that night?

6 A. No.

7 Q. What does 23 say?

8 A. That says just what it does, that this is what

9 he testified to in that deposition on that page.

10 Q. But it's under the section that you say the

11 relevant facts upon which you base your opinion,

12 correct?

13 A. Well, it's a fact that that's what he testified

14 to in that deposition.

15 Q. What is its relevance here?

16 A. That is not for me to determine.

17 Q. Which of the beers did you allocate to him in

18 this audit report?

19 MR. FARRAH: Objection. He hasn't

20 said that he allocated any of the beers in the

21 audit report.

22 A. Right, I did not allocate in the audit report

23 and in the -- in the report on October 26, I

24 used different facts and a different scenario

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1 than the affidavit that was filed in May of '05.

2 Q. What different facts did you use?

3 A. The facts that I laid out were the ones that are

4 shown on page five and page six of that report.

5 VIDEO OPERATOR: Two minutes, counsel.

6 The time is 2:17 p.m. We are now off the

7 record.

8 (Recess)

9 VIDEO OPERATOR: We are now recording

10 on the record. This is the beginning of

11 cassette No. 2 in the deposition of Dr. David

12 Benjamin. The time is 2:26 p.m.

13 Q. Dr. Benjamin, you're aware that in cases like

14 this known as liquor liability cases, in order

15 for the plaintiff to go forward, they have to

16 file a 60-J affidavit?

17 A. I know they have to file some sort of affidavit,

18 yes.

19 Q. And as part of that in this case, you filed an

20 affidavit with the court, correct?

21 A. Yes.

22 Q. And that's been -- I have been calling it

23 Exhibit 3, it's actually Exhibit 2, correct?

24 A. Well, it does say two, yes, it does.

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1 Q. On page four of that exhibit, going on to page
2 five, it states the various documents that you
3 reviewed for purposes of that deposition, excuse
4 me, that affidavit?

5 A. Yes, it does.

6 Q. And on page three of your expert report in this
7 case, it says what documents you reviewed in
8 order to make your opinion in this case,
9 correct?

10 A. Yes.

11 Q. And then starting on page five of this, of your
12 affidavit that you filed in this case, you start
13 at paragraph nine, a series of paragraphs upon
14 which you say you relied upon them, paragraphs
15 10 through 30, correct?

16 MR. FARRAH: Objection to the form.

17 A. I'm not sure I understand that question.

18 Q. Okay. Paragraph nine says that you relied upon
19 the following relevant background facts on which
20 you based your opinion, correct?

21 A. Yes, it does.

22 Q. The paragraphs that you found to be relevant
23 background facts upon which you base your
24 opinions were paragraphs 10 through 30, correct?

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1 A. Yes.

2 Q. And if they weren't relevant, you wouldn't have
3 put them in there, correct?

4 A. Most likely not.

5 Q. And the reason that you put in the fact that
6 Michael Espey had had a beer that night is that
7 that's relevant as to what was served to the
8 table that evening, correct?

9 MR. FARRAH: Objection.

10 A. I don't know specifically as to why I put that
11 in.

12 Q. But as you sit here today, even though you put
13 in an affidavit that said it was relevant that
14 he had a beer at the table that night, you're
15 not assigning any of the beers in this case to
16 him in your report?

17 A. I did not.

18 MR. FARRAH: Objection. No, excuse
19 me, just for the record, the question, the
20 paragraph does not say that Espey has a beer at
21 the table.

22 Q. Are you aware of Mr. Espey having anything to
23 drink that night other than what he drank at the
24 table? Again, we're talking Michael Espey.

1 A. Right, right. As I told you, there were so many
2 documents that I reviewed that I don't have a
3 clear recollection of the independent documents.

4 Q. Okay. So you're not aware, are you aware of
5 anybody who said he had anything to drink that
6 night at the Longhorn other than what he drank
7 at the table?

8 A. He who?

9 Q. Mike Espey.

10 A. I don't have any recollection, I don't have a
11 recollection one way or the other.

12 Q. But you read his deposition, correct?

13 A. I put it down there.

14 Q. You read it for purposes of your affidavit,
15 correct?

16 A. Right.

17 Q. You read it for purposes of your expert opinion
18 in this case, correct?

19 A. I did.

20 Q. And you said that it's a relevant fact that he
21 had a beer at the Longhorn, correct?

22 A. Well, let me just review that one particular
23 statement.

24 Q. Well, I'll withdraw the question. I want you to

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1 assume that Michael Espey testified in the
2 Southworth case, the deposition you found to be
3 reliable, that when he arrived there, the only
4 thing he had to drink was what he had to drink
5 at the table?

6 A. Okay.

7 Q. I want you to assume that. Assuming that, does
8 that change your opinion in this case at all as
9 to how much Mr. Southworth had to drink at the
10 table that evening?

11 MR. FARRAH: Objection.

12 A. No.

13 Q. I want you -- have you read the interrogatory
14 answers of Mrs. Rosario?

15 A. Probably not.

16 Q. Do you understand that in the interrogatory
17 answers, she answers and signs under the pains
18 and penalty of perjury that Michael Espey had a
19 beer at the table that evening?

20 A. Mrs. Rosario?

21 Q. Yes.

22 A. Stated that.

23 Q. In her Answers to Interrogatories signed by
24 Mr. Farrah and her.

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1 A. I'm confused. Where was Mrs. Rosario in this
2 scenario?
3 Q. I don't believe she was there. I'm just telling
4 you what's in the Answers to Interrogatories,
5 did you bother to read them?
6 A. I don't know that it was a question of bothering
7 to read them. It was --
8 Q. Who told you to assign both beers to
9 Mr. Southworth that night, was that Mr. Farrah?
10 MR. FARRAH: Objection.
11 A. Yes.
12 Q. That's not based on any independent statements
13 in any of the depositions, correct?
14 MR. FARRAH: Objection.
15 A. I cannot recall.
16 Q. What else did he tell you to assume for a fact?
17 A. Can you clarify something for me?
18 Q. I'm not here to answer your questions. I don't
19 mean to be disrespectful. I think you know how
20 this works.
21 A. All right.
22 Q. What else did Mr. Farrah tell you to assume for
23 purposes of a hypothetical?
24 MR. FARRAH: Objection.

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1 A. We're assuming that the drinks that were
2 consumed by Jeffrey Southworth were the ones
3 that I listed. We're also assuming that the
4 composition of the Manhattan was what I was told
5 to use in my calculations.
6 Q. Which was what, the one and a quarter ounce of
7 bourbon and the three-quarter ounce of vermouth?
8 A. Yes, I think so.
9 MR. FARRAH: Objection.
10 A. Which differed, and is less than the recipe from
11 the Longhorn itself.
12 Q. I hate to go over it again but I don't think I
13 understood the answer. You said we were to
14 assume. Does that mean that Mr. Farrah told you
15 to assume these things or you assumed them based
16 on your review of the documents?
17 MR. FARRAH: Objection.
18 A. No, I was asked to assume. However, that
19 information came to me because I was unable to
20 figure out what it was from the -- the documents
21 as they were presented were inadequate to allow
22 me, so I would say, What formula shall I use?
23 And I was said -- told to use this formula.
24 Q. He was the one who told you to assume that he

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1 had both beers at the table?
2 A. Yes.
3 Q. Now you understand from the audit report that
4 there were two entries of Manhattans towards the
5 ends of the evening, one at 9:20 and one at
6 9:24?
7 A. Let me just look at that. At 9:21 and 9:24, is
8 that what you said?
9 Q. Yes.
10 A. Yes.
11 Q. And combined, they totaled seven, correct?
12 A. What is "they" referred to?
13 Q. The number of drinks, the Manhattans, there's
14 four?
15 A. You're talking about the total number of
16 Manhattans that were delivered to the table over
17 the course of the evening?
18 Q. No. Between 9:21 and 9:24, there were two
19 entries of Manhattans being ordered, correct?
20 A. Yes. We just said that.
21 Q. Four in the first entry at 9:21, and three in
22 the second entry; correct?
23 A. Yes, that is correct.
24 Q. A total of seven ordered for the table, correct?

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1 A. That would be correct.
2 Q. Earlier in the evening at 8:51, there are seven
3 Manhattans served ordered all at once, correct?
4 A. That is correct.
5 Q. Now, in putting together your chronology, I
6 believe you testified that you put together what
7 you find to be the most reasonable set of facts,
8 correct?
9 A. Yes.
10 Q. And is it reasonable to assume that if there
11 were seven people at the table, and seven
12 Manhattans were ordered, that each person got
13 one Manhattan?
14 MR. FARRAH: Objection.
15 A. Not really, no.
16 Q. Who do you assign those seven drinks to?
17 A. It's not possible to determine that.
18 Q. You have seven possibly at the table?
19 A. Right.
20 Q. Seven drinks ordered?
21 A. Right.
22 Q. And you're unable to determine who got what
23 drink?
24 A. That's correct.

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- 1 Q. Okay. Now at 9:21 and 9:24, you have a total of
2 seven Manhattans ordered for the table, correct?
3 A. That is correct.
4 Q. Who do you assign those seven Manhattans to?
5 A. Can't really be determined.
6 Q. Why not? There are seven people at the table?
7 A. Sure, but you don't know if one person didn't
8 say, Bring me two.
9 Q. So you can't determine who had what then?
10 A. That's right.

11 MR. FARRAH: Objection.

- 12 Q. But you did determine for your chronology that
13 Mr. Southworth had one of each at those rounds?
14 A. I did.
15 Q. How did you determine that if you can't
16 determine who drank them?
17 A. I was directed to assume that.
18 Q. By counsel?
19 A. Yes.
20 Q. Okay. You wouldn't assume that if seven beers
21 came -- seven drinks came for seven people, that
22 one person got two out of that round, would you?

23 MR. FARRAH: Objection.

- 24 Q. Based on your experience?

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- 1 A. Based on my experience, I have seen that happen,
2 sure.
3 Q. I'm not asking what you have seen happen. What
4 is the most likely scenario based on your
5 experience?

6 MR. FARRAH: Objection.

- 7 A. I can't say that there's necessarily one drink
8 for each person.
9 Q. I'm not asking to say that there's necessarily
10 one for each. I'm asking you a simple question:
11 What is your reasonable conclusion, based on
12 your education, your training, your experience,
13 and your years as a nationally recognized
14 expert, what is your most likely scenario of
15 where those seven drinks went?

16 MR. FARRAH: Objection.

- 17 A. They went to the table and they were distributed
18 among seven or fewer people.
19 Q. The most reasonable fact scenario to you is not
20 that Mr. Southworth got one from each of those
21 rounds ordered three minutes apart, correct?

22 MR. FARRAH: Objection.

- 23 A. I didn't say that.
24 Q. You think the most reasonable interpretation of

- 1 those seven drinks coming to this table is that
2 Mr. Southworth got two of those drinks?
3 MR. FARRAH: Objection.

- 4 A. I said that I could not determine.
5 Q. You have a Jack Daniels Manhattan, according to
6 your chronology on page six of your answer,
7 excuse me, your expert answer.
8 A. Expert answers.
9 Q. Expert report on page six, Exhibit 1. You have
10 a Jack Daniel Manhattan being served to
11 Mr. Southworth at 9:25, correct?

- 12 A. I do.
13 Q. Well, you have another Jack Daniels Manhattan
14 being served to Mr. --

15 MR. FARRAH: Here's your sandwich.

- 16 Q. -- Mr. Southworth at 9:35, correct?
17 A. Yes.

- 18 MR. GILLIS: You want to go off the
19 record and take a five-minute break?

- 20 VIDEO OPERATOR: The time is 2:38 p.m.
21 and we're now off the record.
22 (Recess.)

- 23 VIDEO OPERATOR: The time is 2:52 p.m.
24 We are now back on the record.

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- 1 Q. (MR. GILLIS:) Just as an aside, Doctor, can you
2 tell me how much income you earn on an average
3 year testifying?
4 A. No, I cannot.
5 Q. You're under oath and you're going to tell me
6 you don't know what you earn testifying as an
7 expert?

- 8 A. Exactly, right.
9 Q. Do you know how much -- can you tell me how much
10 you earn as an expert in a year?

- 11 A. I don't know that figure either.
12 Q. Do you have a ball park range?

13 MR. FARRAH: Objection to the form.

- 14 A. No, I do not.
15 MR. FARRAH: Estimate, maybe.

- 16 Q. Would you estimate what you make, do you know,
17 in a year as an expert?

- 18 A. I have no way of determining that figure.

- 19 Q. Well, you file taxes, don't you?

- 20 A. I do.

- 21 Q. Are you telling me you don't remember what you
22 filed in previous years as to what you earned as
23 an expert?

- 24 A. That's true, too, but I don't know what

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1 percentage of that or what the numbers were that
2 came out from expert work.
3 Q. How much money did you earn in 2005 as an
4 expert?
5 A. I don't recall.
6 Q. How much did you earn in 2006 as an expert?
7 A. I don't know either of those numbers, I told you
8 that.
9 Q. How much did you make in 2004 as an expert?
10 A. I don't know that either.
11 Q. How much did you earn last year in nonexpert
12 compensation for anything?
13 A. I have never calculated any of those figures.
14 Q. What did you earn in 2005 for income other than
15 being an expert?
16 A. I never calculated that.
17 Q. What have you earned in your various teaching
18 capacities over the last two years?
19 A. I don't know what that figure is either.
20 Q. Okay. Now your exhibits are being copied so
21 I'll give you a blank copy of the audit report
22 just to follow along. And you can look along,
23 too, with either your counsel.
24 MR. FARRAH: Which is Exhibit 4 you're

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1 talking about?
2 MR. GILLIS: Exhibit 4 and his Exhibit
3 1, which is a report.
4 Q. I think we got up to you at 9:20, so we have
5 determined the first beer at 8:50, you said,
6 came ten minutes after it was ordered. And you
7 assigned it to Mr. Southworth, correct?
8 A. Whatever I said, I said.
9 Q. And now you're saying the second beer came five
10 minutes after it was ordered, correct?
11 A. Which beer are you referring to on this, sir?
12 Q. The second Bud Light at 9:20, if you look at the
13 audit report, page nine, orders items at 9:15?
14 A. This isn't my copy.
15 Q. Your copy is being copied and while we're
16 waiting for that, I gave you that to look at.
17 A. Okay.
18 Q. Do you see 9:15, one Bud Light ordered to table
19 52?
20 MR. FARRAH: Are you asking him to
21 look at the audit report now?
22 MR. GILLIS: Yes.
23 A. Yes, I do.
24 Q. And that was ordered at 9:15, correct?

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1 A. Yes.
2 Q. And you have assigned to Mr. Southworth 9:20 as
3 the time that he received that beer, correct?
4 A. Yes.
5 Q. Okay, and the next drink you have for him is
6 9:21, excuse me, 9:25, a Jack Daniels Manhattan
7 correct?
8 A. Yes.
9 Q. Now, if you look at that audit report on the
10 bottom of that page nine, you see three Jack
11 Daniels Manhattans being ordered and on the top
12 of page ten, one Jack Daniels in that same
13 order, correct?
14 A. Yes.
15 Q. That is the round of drinks that you're saying
16 was his next Manhattan, was his?
17 A. You mean the one that came at 9:25?
18 Q. Yes.
19 A. Yes.
20 Q. So you're now saying that the time of ordering
21 the drink to service is now down to four
22 minutes?
23 MR. FARRAH: Is that a question?
24 Q. Is that correct?

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1 MR. FARRAH: Objection.
2 A. I explained to you before that I tried to divide
3 up those drinks in the amount of time that were
4 there. That there were so many drinks that were
5 ordered, that I tried to divide those drinks up.
6 That's what I explained to you.
7 Q. Is it your opinion that to a reasonable degree
8 of scientific certainty, that it's reasonable to
9 assume that he got a beer, a 25-ounce beer at
10 9:20, and then ordered a Manhattan one minute
11 later which he was served four minutes
12 thereafter?
13 MR. FARRAH: Objection.
14 A. Would you repeat that, please?
15 Q. You have him getting the 25-ounce beer at 9:20,
16 correct?
17 A. Yes.
18 Q. And you have him ordering another beer at 9:21,
19 correct?
20 MR. FARRAH: A Manhattan.
21 Q. Excuse me, a Manhattan.
22 A. A Manhattan.
23 Q. Based on your expertise, is that a reasonable
24 fact pattern?

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1 A. Yes, it is.

2 MR. FARRAH: Objection.

3 Q. One minute --

4 MR. FARRAH: Objection.

5 Q. -- is reasonable between getting a drink and
6 ordering the next one?

7 A. Yes.

8 Q. And drinking the entire thing before the next
9 beer gets there 9:25, you think that's a
10 reasonable assumption to make here in this case,
11 correct?

12 MR. FARRAH: Objection.

13 A. People have shots and beers all the time or
14 mixed drinks with beers all the time.

15 Q. That wasn't the question, Doctor. What I asked
16 you was what is the most reasonable scenario?

17 MR. FARRAH: Objection.

18 A. Your question was did I think it was reasonable
19 and I think the answer is yes.

20 Q. If you tried to divide them up, how come you
21 assigned different time intervals between each
22 drink?

23 MR. FARRAH: Objection to the form.

24 A. I used both the time of ordering and the amount

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1 of time that was available before they left,
2 before they closed out and left. So I used both
3 of those. I just tried to divide the drinks up
4 in reasonable time intervals.

5 Q. Wouldn't you divide them up equally in the time
6 frames in between?

7 A. If they were ordered at equal times, I would.
8 But in this situation, that was the scenario
9 that I used.

10 Q. So because it was ordered a minute after the
11 previous drink was served, you shortened up the
12 time that it was served?

13 MR. FARRAH: Objection.

14 A. That wasn't the only thing. I told you I'm
15 trying to fit all the drinks into the allocated
16 time period before they close out the check.

17 Q. So you have that 9:21 entered into the computer,
18 delivered to the table at 9:25, correct?

19 A. Correct.

20 Q. Okay. And then you have the next drink coming
21 at 9:35, is that correct, according to your
22 expert report?

23 A. Yes, I do.

24 Q. What time was that beer ordered?

1 MR. FARRAH: That Manhattan.

2 MR. GILLIS: The Manhattan, I'm sorry.

3 A. 9:25.

4 Q. So to a reasonable degree of scientific
5 certainty, it is your opinion that

6 Mr. Southworth ordered his final Manhattan
7 before his previous Manhattan was even delivered
8 to the table?

9 A. Yes.

10 Q. Does it not seem more reasonable to you as an
11 expert in this area, that with seven people at
12 the table and seven drinks, all the same drink
13 being ordered three minutes apart, four in one,
14 three in the other, wouldn't it be more
15 reasonable if one went to each person at the
16 table?

17 MR. FARRAH: Objection.

18 A. Not necessarily, no.

19 Q. I'm not asking necessarily, I'm asking you
20 what's the most logical conclusion based on your
21 experience and training?

22 MR. FARRAH: Objection.

23 A. That either scenario could be reasonable.

24 Q. Is it your opinion as an expert that it's just

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1 as likely that seven Manhattans that were
2 ordered for 9:21 and three at 9:24 for a table
3 of seven, it's just as likely one gentleman
4 drank from each of those rounds than the other
5 scenario of seven people each getting one drink?

6 MR. FARRAH: Objection.

7 A. I can't answer that question.

8 Q. Well, you just said a minute ago that they're
9 equally reasonable?

10 A. That's the answer.

11 Q. You think?

12 A. Either one could have been possible, sure.

13 Q. I'm not asking what's possible. I'm asking you
14 what is the most reasonable set of facts based
15 on your experience and training?

16 A. Based on my experience and training there is
17 no -- there is no typical situation. There are
18 plenty of people who order one drink as they're
19 receiving another with the intent of wanting to
20 order that, especially getting late in the
21 evening and leaving.

22 Q. That's as a reasonable an assumption that he had
23 one of each, correct?

24 MR. FARRAH: Objection.

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1 A. That's the time scenario that I used.

2 Q. Okay. Now, if there were four drinks in the

3 first round and three drinks in the second

4 round, you have concluded for purposes of this

5 case, and for putting together your chronology

6 that Mr. Southworth had one from each, correct?

7 A. Yes.

8 Q. How many other people at the table had one from

9 each of those two rounds?

10 A. I don't know.

11 Q. What's reasonable to assume based on the facts

12 you reviewed in this case?

13 MR. FARRAH: Objection.

14 A. That some of them had some of the drinks. What

15 can I say?

16 Q. So you don't have an opinion? Mr. Southworth,

17 as far as you know, is the only person of the

18 seven there who had one from each round?

19 MR. FARRAH: Objection.

20 A. Mr. Southworth is a very heavy drinker, and he

21 drank a lot that night.

22 Q. Maybe you can try answering my question for \$650

23 an hour.

24 Do you have any evidence that anyone

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1 other than Southworth had in your opinion two

2 drinks that night?

3 MR. FARRAH: Two drinks, is that the

4 question?

5 Q. One from each of those two rounds: 9:21 and

6 9:24?

7 A. When you say do I have any evidence, you mean

8 was there anything in the record?

9 Q. Yes.

10 A. Not that I recall. I don't recall.

11 Q. What is the basis for your concluding that he

12 was the only one there who drank one of each of

13 those rounds of drinks?

14 A. Being asked to assume.

15 Q. So you were asked to assume that from

16 Mr. Farrah, correct?

17 A. Yes.

18 Q. That's not something that you would normally

19 assume, would you?

20 MR. FARRAH: Objection.

21 A. I might.

22 Q. I'm not asking what you might. What would you

23 normally assume if you saw seven drinks of the

24 same coming to seven people three minutes apart?

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1 MR. FARRAH: Objection.

2 A. There is no typical scenario that constitutes

3 what I might normally assume.

4 Q. So you can only put a value, you can only assume

5 what the hypothetical you're told from the

6 counsel, correct?

7 A. That's true.

8 Q. Okay.

9 VIDEO OPERATOR: The time is 3:04 p.m.

10 We are now off the record.

11 (Recess.)

12 VIDEO OPERATOR: The time is 3:04

13 p.m. and we are now back on the record.

14 Q. You have up until this point in your

15 calculations, your chronology, rather, assigned

16 either ten minutes or less for every drink that

17 came to the table that evening, correct?

18 A. Whatever the document says is what it says.

19 Q. But now when the drink that you are being asked

20 by Attorney Farrah to assume that Mr. Southworth

21 had a drink in that round at 9:24, you're now

22 assuming that it took 11 minutes for that drink

23 to get to the table, isn't that correct?

24 A. Would you repeat that, please?

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1 Q. The last drink which Mr. Southworth was ordered,

2 according to the audit report -- and you can

3 have your originals back now -- was ordered at

4 9:24? Is that correct?

5 MR. BIKOFSKY: These are the documents

6 you wanted one copy of.

7 A. 9:24, the last group of Jack Manhattans.

8 Q. Why is it then that you assigned 11 minutes

9 later for this Jack Daniels to get to the table

10 when the previous Jack Daniels was able to make

11 it there in four minutes?

12 A. Well, I wanted to give them a little time to

13 drink the first one, too.

14 Q. Well, you only gave them four minutes to drink a

15 25-ounce beer, why did you give him 11 minutes

16 to drink the two-ounce Manhattan?

17 MR. FARRAH: Objection to the form.

18 A. I don't have any special answer for that.

19 Q. You have no basis for that, correct?

20 MR. FARRAH: Objection.

21 A. I have no basis in the record or anybody saying

22 he drank it at this time or whatever, no.

23 Q. In fact, in your prior sworn testimony under

24 oath under the pain and penalties of perjury,

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1 you said that he had that last drink at 9:30,
2 isn't that correct?
3 A. That was in the affidavit?
4 Q. Yes.
5 A. Yes.
6 MR. FARRAH: Can we see what the
7 affidavit says before we ask him to assume that?
8 Where is that?
9 Q. Go to page seven of your previous affidavit.
10 And just below, it says 9:57, check closed out.
11 According to the Longhorn audit report, the last
12 drinks were served to Southworth departing the
13 Longhorn at approximately 9:30, the bill was
14 paid at 9:57. Six meals and four appetizers
15 were served to table 52. That's your opinion,
16 correct?
17 MR. FARRAH: Objection.
18 A. That's not my opinion. That's a statement off
19 of the bill.
20 Q. Where on the bill -- you have the bill there?
21 Where on the bill does it say they got the last
22 drink at 9:30?
23 MR. FARRAH: It says approximately
24 9:30, Michael.

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1 Q. Where on the bill does it say they got the drink
2 at approximately 9:30?
3 A. The last drink was ordered at 9:24. The check
4 was printed at 9:36. In the midst of that time
5 interval from 9:24 to 9:36, the drink would be
6 delivered or served.
7 Q. And based on your affidavit in this case where
8 you were asked to give your opinion as to
9 Mr. Southworth's blood alcohol at various
10 levels, various times in the evening, you stated
11 that he got his last drink at 9:30, correct?
12 MR. FARRAH: It says approximately.
13 A. It says approximately.
14 MR. FARRAH: Approximately 9:30.
15 Q. You're an expert in this field, aren't you?
16 A. I am.
17 Q. You try -- and again, you say the chronology,
18 you try to make it as detailed and as accurate
19 as possible, correct?
20 A. I do try.
21 Q. And when you were doing that for the first time
22 in this case, you assigned 9:30 as the time when
23 the last drink was served, correct?
24 MR. FARRAH: It says approximately.

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1 I'm sorry. You know, I keep forgetting.
2 Approximately, can you see it there?
3 Approximately, Mr. Gillis.
4 MR. GILLIS: When we're asking you the
5 questions, then you can answer.
6 MR. FARRAH: Just be true to what the
7 record is.
8 MR. GILLIS: Don't tell me
9 Dr. Benjamin is an expert in this field isn't
10 able to answer his own questions.
11 MR. FARRAH: Frame the questions
12 truthfully and he'll answer them.
13 Q. You wouldn't say approximately 9:30 if you
14 didn't mean 9:30, would you?
15 MR. FARRAH: You're going to say
16 approximately.
17 MR. GILLIS: Will you let him answer
18 the question? It's his question; not yours.
19 MR. FARRAH: Please, I object.
20 A. I said approximately 9:30.
21 Q. And that was the time frame at that point when
22 you filed this affidavit under the pains and
23 penalty of perjury that you thought was most
24 accurate, correct?

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1 MR. FARRAH: Objection.
2 A. I did at that time, yes.
3 Q. And what have you reviewed since then that
4 changed your opinion from 9:30 to 9:36?
5 MR. FARRAH: Approximately 9:30.
6 MR. GILLIS: Yes.
7 MR. FARRAH: To 9:35?
8 Q. 9:35, I'm sorry.
9 MR. FARRAH: Thank you.
10 A. Once again, I was trying to fit in that drink
11 into that time scenario.
12 Q. Well, didn't you have the audit report when you
13 did your affidavit?
14 A. I'm not sure if I did or not. Did I list it
15 among the documents?
16 Q. I want you to assume that it was listed. On the
17 top of page five, Exhibit 5?
18 A. Yes, I did have that.
19 Q. Okay. And at that time, you were trying to do
20 the same thing, weren't you, to put together as
21 accurate a chronology as you could?
22 A. Yes, I was.
23 MR. FARRAH: Objection.
24 Q. At that time, you have a different time for the

1 drink than you currently have, correct?

2 MR. FARRAH: Objection.

3 A. Now, just help me out. Which drink are you
4 referring to specifically, please?

5 Q. Well, we know from the audit report that there
6 were no drinks ordered by this table after the
7 round of drinks at 9:24, correct?

8 A. Right.

9 Q. And we're trying to figure out from you is why
10 you assigned one time to it in your affidavit,
11 which you signed under the pains and penalties
12 of perjury with the same materials available to
13 you that you are currently assigning in your
14 expert submission to this, to the court in this
15 case?

16 MR. FARRAH: Objection.

17 A. Which question, which time are you questioning?
18 The 9:35 time on the --

19 Q. According to your affidavit, what do you assign
20 the last drink being served to Mr. Southworth
21 at, what time?

22 A. 9:24.

23 MR. FARRAH: No, no. According to
24 the -- the affidavit speaks for itself. The

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1 question is what time was it served.

2 MR. GILLIS: Are you going to let him
3 answer the question?

4 MR. FARRAH: Come on. You have asked
5 the questions in the affidavit.

6 Q. In this case in your expert submission, you're
7 saying the drink was served at the table at
8 9:35, correct?

9 A. Excuse me, ask me that again.

10 Q. In this case, in your expert submission?

11 A. What are you referring to as the expert
12 submission, please? You keep calling things by
13 different names.

14 Q. Document one.

15 A. That's not helping me either. Call it either
16 the affidavit or the Rule 26 report, then I'll
17 understand.

18 Q. Rule 26 report, page six, which you have in
19 front of you there, you have the last drink
20 being served at 9:35; correct?

21 A. That is what I said, yes.

22 Q. And that's not what you have in your affidavit,
23 correct?

24 A. Here I have in the affidavit it was ordered 9:24

1 and I'm saying it's being served at 9:30,

2 approximately 9:30.

3 Q. What documents have you reviewed between the
4 time you filed the affidavit and the time of
5 your Rule 26 submission that changed your time
6 sequence in the chronology as to when he was
7 served his last drink?

8 A. The time sequences isn't changed at all. The
9 sequence is absolutely the same. It's only a
10 five-minute difference.

11 Q. Well, the five-minute difference changes
12 substantially what his blood alcohol was when he
13 got served his last drink, doesn't it?

14 A. No, it doesn't.

15 MR. FARRAH: Objection.

16 Q. We'll get to that in a minute.

17 Can you tell me the equation that
18 makes up the Widmark Formula?

19 MR. FARRAH: Objection to the form.

20 A. Yes. I've shown it to you already. It's right
21 here.

22 Q. Okay. And that formula is typed up in your
23 affidavit at the top of page ten, correct?

24 MR. FARRAH: Let's see.

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1 Page ten of his report or his
2 affidavit?

3 A. Affidavit.

4 Q. Does the -- what we have here that you are
5 looking at is a page that's part of Exhibit 5
6 which has some calculations that you did in
7 pencil, that's your handwriting, correct?

8 A. It is.

9 Q. And on the top of the equation, you used the
10 specific gravity of blood?

11 A. Yes.

12 Q. Does that ever change or is that always the
13 same?

14 A. It changes.

15 Q. How does the gravity of blood change?

16 MR. FARRAH: Objection.

17 A. It's not the gravity, it's the specific gravity.

18 Q. How does the specific gravity of blood change?

19 A. It's a function of how much water is in the
20 blood and how many red blood cells are in the
21 blood.

22 Q. How much water was in Mr. Southworth's blood
23 that night, and how much red blood cells was in
24 his body that night?

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1 A. Right. Since it's impossible to determine that
2 in just about every case that you do, I used a
3 value that was common to both men and women and
4 overlapped that range.
5 Q. Is it fair to say that when you can't tell the
6 exact number, you use like you do here, a number
7 that based on your scientific training is
8 consistent with most people?
9 A. Well, I wouldn't phrase it that way. I would
10 just say that I use a reasonable estimate that's
11 not extreme in any way.
12 Q. Based on your experience and training, I believe
13 you put one point --
14 A. 06.
15 Q. -- 06 is a reasonable estimate?
16 A. Yes.
17 Q. Next to that, you have the specific gravity of
18 ethanol, correct?
19 A. Yes.
20 Q. How do you determine the specific gravity of
21 ethanol?
22 A. That's a given. That's a known scientific fact.
23 Q. That doesn't change this in any equation that
24 you do?

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1 A. It never changes. It's always the same.
2 Q. Next to that, you have the grams of ethanol,
3 correct?
4 A. Yes.
5 Q. And that is -- is that the total grams over the
6 course of evening or is it just per drink?
7 MR. FARRAH: Objection.
8 A. That's the total amount that is used in the time
9 interval that's being calculated.
10 Q. Okay. And underneath, you have the body weight
11 in kilograms, correct?
12 A. Correct.
13 Q. Now, in order to get kilograms in this case, you
14 had to take Mr. Southworth's weight in pounds
15 and convert it to kilograms, correct?
16 A. I did.
17 Q. What do you use to convert that?
18 A. 2.2 pounds per kilogram.
19 Q. You divide his weight by 2.2?
20 A. Yes.
21 Q. And then next is a number that you call a
22 Widmark R?
23 A. Yes.
24 Q. What's a Widmark R?

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1 A. That's the distribution factor.
2 Q. What does that mean?
3 A. That is a factor to control for how extensively
4 the ethanol is distributed into the water
5 soluble parts of the body.
6 Q. And is that like the specific gravity of blood,
7 that without knowing exactly the distribution
8 within the person, you take a constant?
9 A. You can take the constant or you usually make an
10 adjustment on that constant based on height and
11 weight, and if you have a photo of the
12 individual, which I had as well.
13 Q. And based on your -- the information that you
14 were provided in this case, did you make any
15 assumptions as to his body composition,
16 Mr. Southworth's?
17 A. Just that he wasn't totally lean, and he had a
18 little bit of love handles hanging over his
19 belt.
20 Q. Is that what you put in your report?
21 A. I don't know what I put in my report about that.
22 Q. And what did you assume as a Widmark R for him
23 in this case?
24 A. .64.

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1 Q. Is there a calculation you can do to get an
2 accurate Widmark?
3 MR. FARRAH: Objection to the form.
4 A. You can weigh the person in water and weigh the
5 person on a scale. Take the ratio.
6 Q. Aren't there calculations you can do to get it?
7 MR. FARRAH: Objection.
8 A. Well, I don't know. Maybe you know some
9 calculations you can do.
10 Q. Well, are you aware of any calculations you can
11 do?
12 MR. FARRAH: Objection to the form.
13 A. You have to measure like doing skin folds and
14 things like that and determine body fat.
15 Q. Well, if you don't have all that available to
16 you, don't you teach people to assume that all
17 males are a .68 for purposes of calculation?
18 MR. FARRAH: Objection.
19 A. .68 is an average factor.
20 Q. For males?
21 A. Yes, it is.
22 Q. And .55 for females?
23 A. For females is correct.
24 Q. Did you use that in this case?

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1 A. No, I used .64.
2 Q. Why is that?
3 A. Because I dropped it four points because when I
4 saw the photo of him because he had those love
5 handles.
6 Q. I'm going to show you a copy, and I'm going to
7 suggest to you this is a copy of the Widmark R's
8 for males and females, and ask you if you can
9 find any male of any height in any size that has
10 a Widmark of a .64?
11 MR. FARRAH: Objection, to whatever
12 that document is.
13 Can I have a copy it, by the way,
14 since you have shown it to him?
15 Before he answers, can I get a copy?
16 Will you give it to David?
17 So what is the question? Thanks.
18 Q. (MR. GILLIS:) The question is -- well, let me
19 ask it two ways. First of all, what literature
20 in the scientific community are you basing your
21 lower Widmark on to give him a 64 as opposed to
22 a .68?
23 MR. FARRAH: Objection.
24 A. I'm making that assessment myself.

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1 Q. You understand that for an average, male that a
2 .68 is the standard for males, correct?
3 A. Yes.
4 MR. FARRAH: Objection.
5 Q. And you have testified in this case or you have
6 stated under oath in this case that
7 Mr. Southworth was not obese, correct?
8 MR. FARRAH: Objection.
9 A. Was not obese, yes. That depends how you define
10 obese.
11 Q. How do you define it?
12 A. There's a formula for body mass index.
13 Q. I'm going to show you your affidavit again on
14 page 10, and as part of your opinion, you put in
15 there he was not obese and had a height of
16 six-four, correct?
17 A. He was not obese and had a height of six-four.
18 Q. You assumed he weighed 210 pounds, correct?
19 A. Yes.
20 Q. And according to that chart, the appropriate
21 Widmark should be between 68 and 7, correct?
22 MR. FARRAH: Objection.
23 Q. .68 and .7 for someone of that height and
24 weight?

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1 A. I'm afraid I don't understand how to read the
2 chart.
3 Q. You can't read the chart? You take the height
4 at the top side and the weight on the top and
5 you take your two fingers and go right to the
6 number. What number do you get in that 6-4,
7 210-pound range?
8 MR. FARRAH: Objection.
9 A. I'm sorry, I'm not understanding how to read
10 this chart.
11 Q. Are you aware of anywhere that has a Widmark of
12 .64?
13 MR. FARRAH: I'm sorry.
14 A. Am I aware of what?
15 Q. Anywhere on that chart, any height, any weight?
16 MR. FARRAH: It might be helpful to
17 tell him where the chart comes from.
18 A. I know where it comes from.
19 Q. Where does it come from?
20 A. It's from Bill Forest.
21 Q. Do you know Mr. Forest?
22 A. I do.
23 Q. Who is he?
24 A. He's a forensic guy over in England.

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1 Q. Have you met him before?
2 A. I'm sorry.
3 Q. Have you met him?
4 A. Yes.
5 Q. Is he someone whose opinion you respect?
6 A. No, not particularly. But I'm not understanding
7 this chart. I'm very sorry, but I don't
8 understand this chart.
9 Q. Well, let's go back to your article you
10 published.
11 MR. FARRAH: Can I get a copy of the
12 article, since you have referred to it a few
13 times? I'll waive any copyright claims against
14 you.
15 Thanks. What page are we going to?
16 Q. We'll get there. Can you tell me what
17 scientific basis you have on any literature or
18 anything accepted in the forensic toxicology
19 field that assigns a .64 Widmark to a six foot
20 four, 210-pound male who's not obese?
21 MR. FARRAH: Objection.
22 A. I don't have anything to reference.
23 Q. In fact, what's normally referenced is a .68,
24 correct?

149

1 A. No.

2 MR. FARRAH: Objection.

3 A. .68 is the average for all males.

4 Q. And why did you deviate from that in this case?

5 A. Because he had that little two-inch love handles

6 protruding from his waist.

7 Q. So all males, if you were to take all males that

8 are less fat than Mr. Southworth is, based on

9 your review of his picture in this case?

10 MR. FARRAH: Objection.

11 A. Say that again, please.

12 Q. The Widmark would be higher if you have less

13 body fat, correct?

14 MR. FARRAH: Objection.

15 A. The Widmark what?

16 Q. R.

17 MR. FARRAH: Same objection.

18 A. Would be higher if you have less body fat?

19 Q. Right.

20 A. Is that what you said?

21 Q. Yes.

22 A. Yes. And lower if you have more body fat.

23 Q. Taking the average of all males to be .68

24 looking at Mr. Southworth's picture?

150

1 A. Right.

2 Q. You have opined that he is fatter than the

3 average population of males in general?

4 MR. FARRAH: Objection.

5 A. Yes.

6 MR. FARRAH: Not including anybody in

7 this room, of course.

8 Q. Based on what?

9 A. What?

10 Q. Based on what?

11 A. Based on my assessment.

12 Q. I don't know your assessment. What is the

13 average body fat of the males that get a .68 R

14 on the Widmark?

15 A. Probably, well, I would have to speculate so I

16 can't answer.

17 Q. So if you don't know what it is, you can't say

18 why you should assign anything differently to

19 Mr. Southworth, correct?

20 A. No. That's not the case at all.

21 MR. FARRAH: Objection.

22 Q. Is the picture that you looked at, what picture

23 was it?

24 A. I think it was a picture of him with no shirt

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1 on.

2 Q. And that was part of the police report, correct?

3 A. I believe so.

4 Q. In the book that you provide for judges and

5 lawyers, you used a .68 Widmark Formula,

6 correct, R, in your formula?

7 MR. FARRAH: Objection to the form.

8 A. In an example?

9 Q. Yes.

10 A. Yes. In one example. One isolated example,

11 sure.

12 Q. By the way, getting back to that, this is the

13 same one with the chronology of the buffalo

14 wings, you had the gentleman eating all the

15 buffalo kings, correct?

16 A. Yes.

17 Q. He orders them at one o'clock and then eats all

18 of them himself?

19 A. Correct.

20 Q. How many buffalo wings are you averaging on an

21 order here?

22 A. There's no specific amount.

23 Q. Does he eat them all at once or does he eat them

24 sequentially?

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1 A. This is a hypothetical.

2 MR. FARRAH: Objection to the form.

3 A. This is a hypothetical scenario of a person who

4 is eating them.

5 Q. How long would you expect him to eat it?

6 A. I don't know. It depends on how many wings

7 there were in the order, and since it's

8 hypothetical, there's no specific amount.

9 Q. Okay. But not even knowing the rate at which he

10 was eating or how many buffalo wings he was

11 eating, you assigned an absorption rate of 60

12 minutes from the second he orders that until

13 3:30 when the burger is ordered, correct?

14 A. I did.

15 Q. That's what you find to be the most accurate

16 under these circumstances of this chronology,

17 correct?

18 MR. FARRAH: Objection.

19 A. Those were the parameters that I used in that

20 one particular example, yes.

21 Q. Didn't you previously testify that this is the

22 manner in which you teach people to use the

23 Widmark?

24 A. This is the manner in which I teach people.

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1 Q. This is the proper way to do it, correct?

2 MR. FARRAH: Objection.

3 A. This is an example of using the proper formula

4 and fitting the data into the formula, yes.

5 Q. And the proper data for the average male is to

6 use a .68 R in the Widmark, correct?

7 MR. FARRAH: Objection.

8 A. For an average person, if you want to call that

9 person average, right.

10 Q. Now, in addition to that, you used these to get

11 a particular blood BAC, correct?

12 MR. FARRAH: Objection.

13 A. I use those to calculate the blood alcohol at

14 various points in time.

15 Q. And the blood alcohol is for a male 150 to 200

16 pounds, correct?

17 MR. FARRAH: Objection.

18 A. Whatever I have in that particular example, I

19 have in that example.

20 Q. When you're using those BACs, you're calculating

21 it, when you say that at .15 in the forensic

22 toxicology community, that's the standard you

23 used for visible signs of intoxication, correct?

24 MR. FARRAH: Objection.

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1 A. I say that that is the -- generally, the number

2 that is utilized that's correct.

3 Q. That's the standard, isn't it?

4 MR. FARRAH: Objection.

5 A. Well, there is no firm standard because an

6 individual's tolerance and an individual's

7 ability to cope with the effects of alcohol vary

8 significantly.

9 Q. There's no standard in the toxicology?

10 A. Not for all people universally. The .15

11 standard is the number that is given most often

12 because there is a change from 62 percent, I

13 think, to almost 90 percent at the .15 level.

14 So the .15 level is given as the standard but

15 you know that you need to evaluate each

16 individual on their own.

17 Q. Let me show you a picture and ask you if that's

18 the photograph that you were referring to?

19 MR. FARRAH: What is this from, do we

20 know.

21 A. The one I have, the one I have is a more

22 complete picture of his abdomen.

23 MR. GILLIS: Do you have other

24 photographs other than this?

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1 MR. FARRAH: I don't know if I do or

2 don't.

3 A. That is not the full photo I saw.

4 Q. This is the gentleman though, correct?

5 A. Yes,.

6 MR. GILLIS: Can we have this marked

7 as an exhibit?

8 (Exhibits 6-7 marked for identification.)

9 Q. Doctor, I want you to take Exhibit 7, I want you

10 to turn to page 98 of that exhibit. And on the

11 bottom of the page is a paragraph that starts

12 with the word However. And one, two, three,

13 four, five lines down, there is a sentence that

14 starts in the beginning of that line that says,

15 This is why in the forensic toxicology

16 community, the BAC which serves as the standard

17 for visible intoxication is 0.15, is that what

18 you wrote?

19 A. You're taking that out of context. You need to

20 read the next two sentences, too.

21 Q. Okay. Does that mean everyone below .15?

22 A. No, no, does this mean.

23 Q. Does this mean that everyone between 15 will not

24 be visibly intoxicated.

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1 A. No. Does this mean everyone below .15 percent,

2 keep going.

3 Q. Go ahead, you read it. It's your words.

4 A. Okay. Does this mean that everyone below .15

5 percent will not be visibly intoxicated? Of

6 course not. And does this mean that everyone

7 above .15 percent will be visibly intoxicated?

8 No, again. Just what I said to you before.

9 Q. I'm going to ask you a question, what's the

10 standard in the industry, knowing that people

11 can have different tolerances, what is the

12 standard for showing visible signs of

13 intoxication?

14 MR. FARRAH: Objection.

15 A. The standard is what other people who were with

16 that person say about his behavior at that time.

17 Q. Are you telling me that you wrote that the

18 standard is visible intoxication is 0.15 percent

19 and now you don't agree with that?

20 A. No, I'm not.

21 Q. Is that the standard in the forensic -- is that

22 the standard in the forensic toxicology

23 community, yes or no?

24 A. That is the standard --

1 MR. FARRAH: Objection.

2 A. -- for the blood alcohol concentration. The

3 standard for determining whether the individual

4 is intoxicated or not is the testimony of fact

5 witnesses who were with the person at that time.

6 Q. Now, you say that not everybody will show signs

7 at 15. Some show it before, some show it

8 afterwards, correct?

9 A. Absolutely.

10 Q. In the general public, this .15 at which the

11 standard in the industry is for nontolerant

12 drinkers, correct?

13 A. That is correct.

14 MR. FARRAH: Objection.

15 Q. That's the standard for a 150- to 200-pound

16 male, is that correct?

17 A. It doesn't make any difference about body

18 weight.

19 Q. You would expect someone who is a tolerant

20 drinker to be able to mask symptoms more easily

21 than a nontolerant drinker?

22 A. Not symptoms, signs.

23 MR. FARRAH: Objection.

24 Q. Is that correct?

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1 A. Yes.

2 Q. So and you have put in your report that

3 Mr. Southworth in your opinion is a tolerant

4 drinker, correct?

5 A. Yes.

6 Q. He drinks a lot, doesn't he?

7 A. He does.

8 MR. FARRAH: Objection.

9 Q. So you would expect that he would not show

10 visible signs of intoxication unless he was

11 above the standard for nontolerant drinkers,

12 correct?

13 MR. FARRAH: Objection.

14 Q. On average?

15 A. I would expect that, yes.

16 Q. How much over .15 would you expect for someone

17 who drinks as much as he does?

18 MR. FARRAH: Objection.

19 A. It's very hard to say because one of the factors

20 that's very important is how fast you're

21 consuming the ethanol.

22 Q. Now, going back to the -- by the way, what time

23 did they cash out that evening?

24 A. Cash out?

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1 Q. Cash out their checks?

2 A. You mean what time was the check paid?

3 Q. Yes. I would suggest it happened around page

4 11. It says apply payment.

5 A. Say again.

6 Q. Look at page 11 where it says, Apply payment.

7 MR. FARRAH: What about it?

8 Q. Do you see that?

9 A. Not yet. Now I see it.

10 Q. It's your understanding that the money was

11 actually put into the register at approximately

12 9:57, correct?

13 A. That is the way it looks to me.

14 MR. FARRAH: Objection.

15 Q. After that, obviously she brings the change and

16 so forth back to the table?

17 A. You can assume if you want.

18 Q. What did you assume?

19 A. I wasn't interested in whether she brought the

20 change back to the table or not or whether they

21 said we're all right.

22 Q. Knowing that she didn't cash the check until

23 9:57, does that change your opinion at all as to

24 when they left that evening?

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1 MR. FARRAH: Objection.

2 A. But we don't know who was paying the check or

3 who may have left already.

4 Q. You don't even know who Mr. Southworth left

5 with, do you?

6 A. I don't recall.

7 Q. I want you to assume that he left with Jude

8 Connelly.

9 A. All right.

10 Q. And we have already gone over his testimony as

11 to when Jude Connelly said he left, correct?

12 MR. FARRAH: Objection.

13 Q. That Jude Connelly left at 11 o'clock?

14 MR. FARRAH: Objection.

15 A. He did say that and I disagreed with that.

16 Q. Based on what?

17 A. Based on the fact that he would have had to

18 leave sooner in order to have the next bar --

19 the next drink at the subsequent hotel bar that

20 they went to at 10:30.

21 Q. Let's go over the visible signs that you

22 assigned to Mr. Southworth that evening.

23 You would agree with me people can be

24 loud without being intoxicated, correct?

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1 A. They can be.

2 Q. And at the time during the evening that they

3 were alleged to have been loud, was the place

4 full or empty or somewhere in between?

5 MR. FARRAH: Objection.

6 A. I don't know.

7 Q. Wouldn't that be important?

8 A. No.

9 MR. FARRAH: Objection.

10 Q. You would agree with me that it would be louder

11 if the place was empty talking at the same

12 decibels than it would have been earlier if it

13 was full?

14 A. I don't agree with any such statement.

15 MR. FARRAH: Objection.

16 Q. And how was he carrying himself?

17 MR. FARRAH: When?

18 Q. During the evening?

19 MR. FARRAH: Objection.

20 Q. Mr. Southworth?

21 MR. FARRAH: Objection.

22 A. All I know is that Jude Connelly said he was not

23 carrying himself the way he usually does towards

24 the end of the evening.

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1 Q. Towards the end of the evening?

2 A. Right.

3 Q. Sometime just before they left, correct?

4 MR. FARRAH: Objection.

5 A. I wouldn't say just before, but let's say within

6 a half-hour or 45 minutes.

7 Q. Based on what -- who said it was at that time

8 frame?

9 MR. FARRAH: What is the basis for

10 that statement?

11 (BY MR. GILLIS:)

12 Q. What's the basis for that time frame?

13 MR. FARRAH: Objection.

14 A. I don't recall the specific basis. I believe it

15 had to do with when they came over to the table

16 and asked them to be quiet.

17 Q. That's when he wasn't carrying himself the way

18 he usually does?

19 A. There were four criteria that Jude testified to.

20 Q. We've gone over the loudness quite a bit. Let's

21 go -- that's why I'm getting to this. I'm

22 trying to find out when in the evening did he

23 not carry himself, Mr. Southworth, carry himself

24 the way he usually did based on your review of

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1 all the documents that you reviewed in this

2 case?

3 MR. FARRAH: The question is does he

4 have a memory now?

5 MR. GILLIS: Yes.

6 Q. Do you know when in the evening he was not

7 carrying himself?

8 A. I can't give you a specific time but it was

9 certainly while he was in the bar.

10 Q. Okay.

11 A. Before they left.

12 Q. And do you know of anybody other than Jude

13 Connelly who says he wasn't carrying himself the

14 way he usually does?

15 A. I don't recall.

16 Q. And what was the way he normally carried

17 himself?

18 A. These were observations by people who knew him.

19 I'm not a person who knew him.

20 Q. So you wouldn't be able to tell me the

21 difference between how he normally carries

22 himself and how he was carrying himself at the

23 table that evening?

24 A. No. But his friends knew him and were able to

164

1 do so.

2 Q. Okay. How is anybody who didn't know him

3 supposed to know that he was carrying himself

4 differently than the way he is supposed to?

5 MR. FARRAH: Objection.

6 A. If by carrying himself differently meaning that

7 he had muscle relaxation and his shoulders were

8 slipping or his head was down, that might be a

9 posture that other people would be able to

10 recognize.

11 Q. But that's not the case here, you have no

12 evidence to that?

13 MR. FARRAH: Objection.

14 A. I don't have specific. I don't know what the

15 specific reference to not carrying himself the

16 way he usually does, I don't know what that

17 refers to.

18 Q. If you don't know how he usually carries himself

19 and you don't know how he looked when he carried

20 himself differently, you can't opine that the

21 way he carried himself should have indicated to

22 the server that he was visibly intoxicated,

23 correct?

24 MR. FARRAH: Objection.

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1 A. I base my opinion on what his friend Jude
2 Connelly said. It was not my -- it's not my
3 opinion, I took it from what he said.

4 Q. What about the way he was carrying himself that
5 evening indicates to the server he's
6 intoxicated?

7 MR. FARRAH: Objection.

8 A. You have to ask Jude Connelly about that, not
9 me.

10 Q. Well, you're the one who opined that that was
11 one of the indicia that he was visibly
12 intoxicated, correct?

13 A. I did say that but based upon --

14 Q. What is the indicia, what is he showing you that
15 shows he's visibly intoxicated?

16 MR. FARRAH: Objection.

17 A. The fact is is that Jude Connelly characterized
18 him that way. Didn't carry himself the way he
19 usually did; his eyes were glazed over; he was
20 louder than usual. There were -- and there's a
21 fourth criteria which escapes me at the moment.
22 That is Mr. Connelly's characterization of him;
23 not mine.

24 I only relied on his characterization,

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1 which he is saying was atypical or unusual and
2 to him connoted that he was intoxicated.

3 Q. In your opinion, what about the way he was
4 carrying himself that night at the restaurant
5 should the server of the alcohol have picked up
6 on?

7 MR. FARRAH: Objection.

8 A. Once again, you would have to ask that of Jude
9 Connelly.

10 Q. So you have no idea based on the way he carried
11 himself that night, what the waitress, not what
12 you counted, but what the waitress should have
13 known?

14 A. First of all, I don't know what the waitress --
15 let me put it a different way. It was
16 Mr. Connelly's characterization that he had some
17 abnormal way he was carrying himself or
18 posturing himself. That was his
19 characterization.

20 Q. I understand what you're saying but that's not
21 the question I asked.

22 The question I asked was what about
23 the way he was carrying himself should have
24 indicated to that waitress who served him drinks

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1 that night at the table that he may be visibly
2 intoxicated?

3 A. Once again, you would have to ask Jude Connelly
4 what he meant about not carrying himself the way
5 he usually did.

6 Q. And you were able to opine that his not carrying
7 himself the way he usually does was based solely
8 on his ingestion of alcohol that night as
9 opposed to any other reason?

10 MR. GILLIS: Objection.

11 A. I inferred from Connelly's testimony that that
12 was what he was referring to.

13 Q. Okay. And it had nothing to do with the fact he
14 had been dirt biking for three hours, is that
15 correct?

16 A. So had the other fellow.

17 Q. How were they carrying themselves?

18 A. There was no testimony to that.

19 Q. Now, you chose to believe Mr. Connelly's
20 deposition in the Southworth case over his
21 deposition in this case because it was closer in
22 time to the incident, correct?

23 A. Yes.

24 Q. And because, as you said, the testimony wasn't

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1 obfuscated; correct?

2 MR. FARRAH: Objection.

3 Q. Was not? You would agree with me --

4 A. Yes.

5 Q. And you would agree with me that statements
6 closer in time you assessed more reliability to,
7 correct?

8 A. I did.

9 Q. And you were aware that more than a year prior
10 to that deposition, Mr. Connelly gave sworn
11 testimony to the grand jury, correct?

12 A. Yes, I do.

13 Q. And based on what you said, that would be more
14 reliable because it's closer in time, correct?

15 A. Using the time criterion, yes.

16 Q. That's your criterion, correct?

17 A. Yes.

18 Q. Did you review that testimony in making your
19 opinion here in this case?

20 A. For which document?

21 Q. Either one?

22 A. Well, I don't know, did I include it? Is it
23 included? I don't see them included in here.

24 Q. I'm going to show you a page that I'm going to

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1 represent to you is page 20 from the grand jury
 2 minutes and it's the testimony of Mr. Connelly.
 3 A. Okay.
 4 Q. I want you to read lines one through four.
 5 MR. FARRAH: Can I see it?
 6 Q. I'm going to suggest for the record, this grand
 7 jury testimony was taken at the grand jury of
 8 Middlesex County on Wednesday, November 5, 2003,
 9 in Lowell Massachusetts.
 10 A. Okay. I'm reading it.
 11 Q. Could you read it out loud for the record.
 12 A. Yes.
 13 Question: At any point did you notice
 14 any changes in Jeff Southworth as a result of
 15 what he was drinking?
 16 Answer: Not in particular, no.
 17 Q. Given that this was taken more than a year
 18 before the deposition date --
 19 A. Mm-hmm.
 20 Q. -- you used as a basis for your opinion in this
 21 case, does that change your opinion at all
 22 whether or not he showed visible signs of
 23 intoxication at any time as a result of what he
 24 was drinking that night?

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1 A. No.
 2 MR. FARRAH: Objection.
 3 A. Not really, no.
 4 Q. It doesn't change your opinion at all?
 5 A. No.
 6 Q. Were you provided that by counsel?
 7 A. I don't think so.
 8 Q. It's something you would have wanted to review
 9 in order to make your determination in this
 10 case?
 11 A. I would have wanted to review all the documents
 12 that were available, sure.
 13 Q. That would be helpful in getting an accurate
 14 opinion, wouldn't it?
 15 A. It's good to have as many documents as possible.
 16 Q. I'm going to show you what is purported as page
 17 34 of that same grand jury testimony. I want
 18 you, if you could, read out loud for the record
 19 lines five through ten.
 20 MR. FARRAH: Let me see it.
 21 A. Okay. It says, now, sir, you indicated that
 22 when you -- who's questioning him here. By the
 23 way?
 24 Q. This is the district attorneys' office.

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1 A. The same thing in the first?
 2 Q. That's correct.
 3 A. Now, sir, you indicated that when you were at
 4 the Longhorn, you didn't notice any changes in
 5 Jeff Southworth's demeanor at any time. Did you
 6 notice any changes in his demeanor, and the
 7 answer is no.
 8 Q. Does that change your opinion as to whether or
 9 not Mr. Southworth showed visible signs of
 10 intoxication while at the Longhorn Steakhouse on
 11 September 26, 2003?
 12 A. No. Because demeanor could refer to a person's
 13 personality, not their physical way of carrying
 14 themselves.
 15 Q. So what should the DA have asked?
 16 MR. FARRAH: Objection.
 17 A. Let me see the other testimony that you asked me
 18 to look at.
 19 The first one at any point -- this is
 20 from page 20, lines one through four -- and at
 21 any point, did you notice any changes in Jeff
 22 Southworth as a result of what he was drinking?
 23 Not in particular.
 24 That is an extremely vague question,

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1 and it would be very different from asking did
 2 you notice any changes in the way he was
 3 carrying himself or his body language or if you
 4 asked for anything specific.
 5 Q. And you don't interpret demeanor to be specific
 6 enough to ask that information, correct?
 7 A. Well --
 8 MR. FARRAH: Objection.
 9 A. I think demeanor can refer to a personality-type
 10 of thing. And then again demeanor -- actually,
 11 Jude testified that he was louder. So if he was
 12 talking about demeanor, he probably didn't
 13 understand the question and just wanted to give
 14 an answer.
 15 Q. That's your assumption?
 16 A. That's my assumption. I don't think that --
 17 Q. There's no scientific certainty to that?
 18 A. There's no signs.
 19 MR. FARRAH: Objection.
 20 A. This is my impression. These are not really
 21 well-formed questions.
 22 Q. So even though -- what would you want him to
 23 ask? Was he visibly intoxicated? Is that what
 24 you would want him to ask?

173

1 MR. FARRAH: Objection.

2 A. That wouldn't be a bad question, Mr. Gillis.

3 Q. That would help you in forming your opinion, if

4 he asked that question?

5 A. Well, if it was more straightforward than a

6 question like that.

7 Q. What should the DA ask -- the DA have asked at

8 the grand jury which was just six or eight weeks

9 after this accident that would be helpful in

10 forming your opinion?

11 MR. FARRAH: Objection.

12 A. Well, now, you're asking me to second guess or

13 to play lawyer. I don't think that that's my

14 role here.

15 Q. Well, you have played lawyer in this, haven't

16 you?

17 A. No.

18 Q. You have assessed credibility to all the facts

19 and come up with your own determination based on

20 the law, isn't that what you did?

21 MR. FARRAH: Objection.

22 A. No, not at all.

23 Q. Didn't you quote multiple cases in your

24 testimony as to the interpretation of Douillard

174

1 in other cases?

2 A. Wait a minute, commenting on something is

3 something completely different. I commented on

4 an error in the interpretation on Douillard and

5 that is correct. That isn't playing lawyer;

6 that's pointing out a scientific, a set of

7 scientific facts that the courts did not take

8 into consideration. They counted the number of

9 drinks and never gave any recognition to the

10 time interval.

11 Q. Let me give you -- I'm going to ask you to read

12 the entire page which is, I'll purport to you,

13 is page 34 of the testimony he gave that day.

14 Could you read that out loud for --

15 A. Sure. You want the whole page?

16 Q. Well, just the testimony.

17 A. Line two.

18 Question: Have you had any contact

19 with Jeff Southworth since then?

20 Answer: Excuse me, no, I have not.

21 Now, sir, you indicated that when you

22 were at the Longhorn, you didn't notice any

23 changes in Jeff Southworth's demeanor at any

24 time. Did you notice any -- this is the same

175

1 thing we just read.

2 Q. Just read the question.

3 A. -- changes in his demeanor? No.

4 Have you been with Jeff Southworth

5 before when he's been drinking?

6 Very rarely.

7 So have you ever seen Jeff Southworth

8 when you believed him to be under the influence?

9 And he says no.

10 And Ms. MacDougal, I have no further

11 questions for this witness. Do any of the grand

12 jurors have any questions for this witness?

13 Q. So according to the testimony under oath by

14 Mr. Connelly, within a couple of months after

15 this accident, Jude Connelly has never seen

16 Mr. Southworth under the influence of alcohol,

17 isn't that correct?

18 MR. FARRAH: Objection.

19 A. That's certainly what he says in that document.

20 Q. And that wouldn't change your opinion at all of

21 whether or not he showed visible signs of

22 intoxication this evening?

23 A. What it does is it makes me suspicious of all of

24 the accounts, many of which are contradicting

176

1 one another, which is one of the first things

2 that I said to you when we started today.

3 Q. So you make the basis of -- you're now

4 suspicious of the other documents, is that what

5 you're saying?

6 MR. FARRAH: Objection.

7 A. No. I came here telling you that there were

8 things that I could not reconcile from the

9 record, that there were inconsistencies and

10 contradictions. And that when I picked up those

11 contradictions, I asked plaintiff's counsel How

12 shall I deal with this in my report or how shall

13 I deal with this in my affidavit? And I

14 received instructions and I dealt with them.

15 Assume this, assume that. And that's what I

16 did.

17 Q. You didn't find any of these facts to a

18 reasonable degree of scientific certainty,

19 correct?

20 MR. FARRAH: Objection.

21 A. Well, a fact would be of scientific certainty.

22 A person's opinion has some variability.

23 Q. Everything that you put in as facts as part of

24 your opinion in this case?

177

1 MR. FARRAH: I'm sorry, could you

2 start that question again? I was turning the

3 page.

4 Q. Everything you state as facts in your Rule 26

5 disclosure is based on opinions of other people

6 as to what happened that night, correct?

7 MR. FARRAH: Objection.

8 A. Well, I don't know. Facts or statements upon

9 which I relied. There's a difference between

10 the fact and the testimonial opinion.

11 Q. Okay.

12 A. I mean you can see that there are differences

13 from the same person answering the same question

14 at different times.

15 Q. I can't agree more. That's what I'm trying to

16 get from you.

17 Given the contrary testimony,

18 particularly of someone like Jude Connelly whose

19 testimony you cite several times in both your

20 affidavits and your expert report, how do you

21 determine what is the correct fact pattern or do

22 you just assume a fact pattern based on what you

23 were told by counsel?

24 MR. FARRAH: Objection.

178

1 A. I wouldn't assume on my own without being

2 instructed to do something. When I find an

3 inconsistency, I asked counsel how should I

4 handle this inconsistency. I'm then directed to

5 make the following assumption and that was how I

6 follow through.

7 Q. So which of the facts in your Rule 26 submission

8 are facts that you determined and which are the

9 facts that were determined for you by counsel?

10 MR. FARRAH: Why don't you point to

11 specific facts and ask him to go through it?

12 A. I think I have stated before that I can't

13 differentiate between those or among those at

14 this point in time.

15 Q. But you did testify as far as the chronology --

16 I withdraw the question.

17 Now, on page six of your expert Rule

18 26 submission?

19 MR. FARRAH: I've lost it, page six?

20 I've got it, sorry.

21 MR. GILLIS: All set?

22 MR. FARRAH: I am now.

23 A. Yes.

24 Q. At the very bottom, it says BAC is achieved

179

1 while drinking, correct?

2 A. That's the last line, yes.

3 Q. Two lines above, a few lines above that -- let's

4 go to the paragraph before that. You determined

5 for purposes of your calculation that each Jack

6 Daniel Manhattan contained two ounces of Jack

7 Daniels and a quarter ounce of sweet vermouth,

8 correct?

9 A. I don't know if it's fair to say I determined.

10 I at that point in time was utilizing the

11 formula that's here in the Longhorn bar recipes.

12 Q. That's what you used for the purposes of

13 calculating the drinks that night, correct?

14 A. That is what I used here, yes.

15 Q. So it wouldn't significantly underestimate it as

16 you said earlier using an ounce and a quarter

17 because you actually used two and a quarter for

18 purposes of your calculations here?

19 MR. FARRAH: Objection to the form.

20 A. What you said is true but it's somewhat

21 misleading. Because my biggest concern was the

22 photo of the glass, the triangular-shaped glass

23 that was filled almost to the top that

24 represents six ounces of volume. Even though --

180

1 but you will recognize that using one and a half

2 ounces of Jack Daniels and three-quarters of an

3 ounce of vermouth comes to a total of two and a

4 quarter ounces and using two ounces of Jack

5 Daniels and one-quarter ounce of vermouth also

6 comes to two and a quarter ounce, which still

7 makes it approximately a little less than a

8 third of what the total volume was of the drink.

9 Q. But as far as the amount of the ethanol

10 consumed, it's significantly different because

11 there's two ounces of an 80 proof as opposed to

12 one and a half ounces of an 80 proof, correct?

13 A. You're right. But you're right about the

14 amounts but you may not be right about using the

15 word significant. Because a half ounce of 40

16 proof is only .2 or about -- is only .2 ounces

17 of ethanol. Altogether, two-tenths of an ounce

18 of ethanol so it's a small amount of ethanol.

19 Q. But for purposes of your calculation, you

20 calculated based on the Longhorn recipe, not on

21 the one and a half, correct?

22 A. That is correct, I did do that.

23 Q. You say in there, too, because of a six-ounce

24 glass that it might underestimate it and you

181

1 said two to threefold?

2 A. Yes. The difference like from two ounces to six

3 ounces are threefold. So I'm saying

4 approximately two and a quarter ounces times

5 three would be six and three-quarter ounces.

6 Q. That would be larger than the glass?

7 A. That would be larger than the glass.

8 Q. So it couldn't be threefold?

9 A. It couldn't be threefold.

10 Q. You know because of the shape of the glass, the

11 further up you get on it because it's a wider

12 base, each ounce taking --

13 A. No, it's a narrower base, wider top.

14 Q. Wider top, each ounce takes up less?

15 A. Less vertical distance. That's part of my

16 reasoning, I agree with you.

17 Q. Now, on the top of page seven, you say that

18 because of Mr. Southworth's size, Widmark

19 calculations indicate that one 25-ounce Bud

20 Light beer consumed on an empty stomach would

21 produce a peak blood ethanol concentration of

22 approximately .02, approximately 60 minutes?

23 A. You have to put the units in. .02 percent, you

24 have to say that.

182

1 Q. .02 percent approximately 60 minutes after

2 beginning to drink the beer, is that correct?

3 MR. FARRAH: Have you read it right?

4 A. Hold on. Yes, concentration approximately .02

5 percent about 60 minutes after beginning.

6 Q. So the actual peak absorption of the ethanol at

7 that point is not 30 minutes later, but 60?

8 A. Under this particular calculation that I did, I

9 used 60 minutes.

10 Q. So if he isn't hitting peak ethanol for an hour

11 after he has the drink, and he has two drinks

12 within ten minutes of the last one being

13 ordered, those drinks aren't even -- they're

14 only slightly in his system at the time the last

15 drink is served?

16 A. That is correct.

17 MR. FARRAH: Objection to the form.

18 Q. By the way, on that same document you have your

19 Widmark calculations, correct?

20 MR. FARRAH: This is the Rule 26

21 report again?

22 MR. GILLIS: Yes.

23 A. Can you give me a page, Mr. Gillis?

24 Q. There's not a page on it, just a chart in the

183

1 middle.

2 A. Thank you.

3 Q. And if you look at the next page which has the

4 time sequences.

5 A. Yes.

6 Q. That starts at 9:05, correct?

7 A. Yes.

8 Q. Where is the calculations for prior to 9:05?

9 A. I didn't run them.

10 Q. Why is that?

11 A. Well, because I can only get two on the page and

12 the earlier period in time was not a significant

13 time interval for me.

14 MR. FARRAH: Can we run them for him?

15 Can we provide those when you come back again?

16 THE WITNESS: I don't know. I don't

17 know if I still have it on the computer. It may

18 have been purged.

19 Q. Well, you can still run them, it's just a matter

20 of putting in the information and getting a new

21 printout, correct?

22 A. Yes. I could run it, I can put the whole

23 scenario in and run it.

24 Q. And at 9:05, you have a BAC of .0951, is that

184

1 correct?

2 A. Yes.

3 Q. Is it your opinion in this case that

4 Mr. Southworth was visibly intoxicated at 9:05?

5 A. Probably not.

6 MR. FARRAH: Objection.

7 Q. At 9:10, you have him at .1058, is that correct?

8 A. Yes.

9 Q. Is it your opinion in this case that

10 Mr. Southworth was visibly intoxicated at 9:10?

11 MR. FARRAH: Same objection.

12 A. You're going to have to go up to a level over

13 .15, like after 9:35, 9:40.

14 MR. FARRAH: Objection.

15 Q. So the first -- if I'm reading this correctly --

16 the first reading over .15 is at 9:40, is that

17 correct?

18 A. 9:40, unless you want to round off the 9:35 one

19 to .15.

20 Q. And that's at the point that a nontolerant

21 person, based on the standard for the forensic

22 toxicology field, that is the point where a

23 nontolerant drinker is expected to show visible

24 signs of intoxication?

185

1 MR. FARRAH: Objection.

2 A. On average.

3 Q. By average, you mean it's more likely than not

4 at that point?

5 A. No. Because that would be more than average.

6 That would be at least 51 percent. This is just

7 saying that a typical, nontolerant drinker would

8 usually show visible signs of intoxication

9 around approximately .5.

10 Q. And in this case, a typical, nontolerant

11 drinker, not someone like Mr. Southworth but a

12 nontolerant would reach that 015 at 9:40?

13 A. Yes.

14 Q. You ascribed to him in this case a burn off rate

15 of .2, is that correct?

16 A. .02.

17 Q. Oh, 02, I'm sorry. Is that correct?

18 A. Yes.

19 Q. And that is actually what you normally used for

20 someone who is a tolerant drinker, correct?

21 A. An experienced drinker, yes.

22 Q. That is not being used -- that's being used

23 because that's what's accurate for someone who

24 drinks the way Mr. Southworth drinks, correct?

186

1 A. That a person who drinks a lot generally is

2 higher than the .015, yes.

3 Q. In fact, when you did the two BACs -- and was it

4 in the Euclair case, the Albert case, was it --

5 you had two different BACs and the burn off for

6 that gentleman was .021, correct?

7 A. Yes. .021 percent an hour, .021 per hour. In

8 the Albert case when the jurors asked me to

9 subtract the differences between the times,

10 that's what the burn off rate came out to be,

11 and I had used .02. That's a very good

12 correlation.

13 Q. People who drink heavily, you ascribe a burn off

14 rate of between 02 and 025, correct?

15 A. Even higher sometimes.

16 Q. And had you ascribed a higher burn off rate to

17 Mr. Southworth in this case, that would decrease

18 his blood alcohol at --

19 A. At each and every point where it was recorded.

20 Q. So the .02 is on the low end for tolerant

21 drinkers, correct?

22 A. It's a reasonable number for tolerant drinkers;

23 the higher ones are exceptional but they do

24 exist at certain points in time.

187

1 Q. I want you to assume that Mr. Southworth only

2 had one of the two beers at the table that

3 night, and that the other beer went to

4 Mr. Michael Espey, I want you to assume that

5 from the facts?

6 A. Okay.

7 Q. How would that reduce Mr. Southworth's BAC at

8 9:40 that evening?

9 MR. FARRAH: Objection.

10 A. It wouldn't have reduced it any more than .02.

11 Q. So it could reduce?

12 A. Probably less. Especially if it was taken with

13 food.

14 Q. So we have two different ones. One of them you

15 said he didn't have food in him yet, and you

16 didn't assign him any of those appetizers,

17 correct?

18 MR. FARRAH: Objection to the full

19 statement.

20 A. I'm referencing something else. We just went to

21 that calculation I did that said that in 60

22 minutes on an empty stomach drinking a beer, he

23 would have a .02. Remember, you just asked me

24 to read that into the record?

188

1 Q. Yes.

2 A. So for Mr. Southworth, if he had no food in his

3 stomach at all and he drank one beer and you

4 measured his blood alcohol 60 minutes later, it

5 would be .02.

6 Q. What would it be 30 minutes later?

7 MR. FARRAH: Objection.

8 A. Probably .01, .01, something heading towards

9 .02.

10 So the answer is that if he consumed

11 it on an empty stomach, it was one of the beers

12 that were like earlier in the evening, it

13 couldn't be more than .02 that it would be

14 reduced.

15 If it was one of the beers that was

16 later in the evening, it would be less than .02

17 because the food decreases the amount of ethanol

18 that's absorbed, not just elongates the amount

19 of time required.

20 Q. The drinks that were -- the beers, the two beers

21 that were served at this table were 25-ounce

22 beers, correct?

23 A. Yes.

24 Q. So the peak, okay. So you're saying the peak is

189

191

1 .02 an hour later because it's .04 minus the
 2 hour for the burn off, correct?
 3 A. No.
 4 Q. Why -- the twelve-ounce beer, according to your
 5 rule of thumb, will have a peak alcohol ethanol
 6 of .02, correct, a 12-ounce beer?
 7 A. At?
 8 Q. At an hour afterwards?
 9 A. No. If you're going to quote me, please quote
 10 my properly.
 11 Q. That's what I'm asking. An hour after a
 12 12-ounce beer is consumed, if I get a beer at
 13 nine o'clock, it's twelve ounces, and I'm
 14 Jeffrey Southworth, what will be my peak ethanol
 15 and when?
 16 MR. FARRAH: Objection.
 17 Q. If I have nothing else to drink?
 18 A. Try it again. Say it more slowly and give me
 19 all the specifics I need to answer the question.
 20 Q. Well, I want you to assume that Mr. Southworth
 21 did not have that beer that you ascribed to him
 22 that you say was served at 8:50, but which we
 23 know was ordered at 8:40. How would that change
 24 his blood alcohol when he got his last drink at

190

1 the Longhorn Steakhouse that evening?
 2 MR. FARRAH: Objection.
 3 A. Okay. The 8:50 beer, I have still a 30-minute
 4 absorption time because it's not with any food.
 5 Okay?
 6 Q. Yes.
 7 A. So the one that I cited for you was drinking
 8 that beer on an empty stomach at 60 minutes,
 9 this is drinking that same beer without any food
 10 in his stomach on 30 minutes, it's going to be
 11 higher than .02. Probably .03 something.
 12 Closer to maybe even .04. Probably .03
 13 something, because this is a 30-minute interval.
 14 The other one you cited was a 60-minute
 15 interval.
 16 Q. But that's what you assigned to him in this
 17 case?
 18 A. Well, this is what I assigned to him before what
 19 I believe the appetizers and the heavier food
 20 came. Then I used the 60. Then on the 60, the
 21 beers that are -- that is assigned with the
 22 60-minute absorption rate, which is drink
 23 No. 6 -- you see drink No. 6?
 24 Q. Yes.

1 A. All right, that's at 9:20. Because at that
 2 time, they finished their whole meal.
 3 Basically, they're winding down and getting
 4 ready to pay the check and leave. Have one more
 5 or two more Jack Manhattans here, but the beer
 6 that you are talking about, the one that you're
 7 inquiring about now, that beer at 60 minutes is
 8 only going to make a difference of about .01 or
 9 so.
 10 Q. But that's not what you ascribed to it in this
 11 case? You ascribed to it a 30-minute time limit
 12 to get into his system, correct?
 13 A. No.
 14 MR. FARRAH: Objection.
 15 A. Yes, but the difference was the 30-minute drinks
 16 are at 8:50, 8:20 and 8:10. 8:10, he's still at
 17 the bar; 8:20, he's still at the bar; there's no
 18 food. Finally, at 8:50, he sits down and he has
 19 one more beer and they have ordered some of the
 20 appetizers and the things that you talked about
 21 earlier.
 22 Q. But you said that those appetizers hadn't
 23 affected him yet?
 24 A. I said they had a minimal effect. That's why

192

1 there's still a 30 minute time interval there.
 2 Q. Based on the timeframes that you have assigned
 3 to these drinks, the 30 minutes for the beer at
 4 8:50, which he got at the table?
 5 A. Okay.
 6 Q. If that beer went to Michael Espey, how would that
 7 change his blood alcohol at 9:35?
 8 A. I don't know Michael Espey's height and weight.
 9 I can't. I only did that for Mr. Southworth.
 10 Q. That's what I'm saying. If Michael Espey had
 11 that beer, you subtracted out of that equation
 12 and said Mr. Southworth didn't drink that beer,
 13 how would it change his BAC when he got served
 14 his last drink that night?
 15 A. Mr. Southworth?
 16 Q. Yes.
 17 A. That's what I'm trying to answer to you. That
 18 at 30 minutes, if that peaks at 30 minutes, it's
 19 probably going to be maybe around .03.
 20 Q. Okay. So that would reduce his BAC at 9:35 from
 21 .1493 down to .1193, correct?
 22 A. Probably not.
 23 Q. Why not?
 24 A. The reason is the following. If you look at the

193

1 second pages with the time scenario --

2 Q. Yes.

3 A. -- associated with the Widmark, now I suggest to

4 you you turn it horizontally as I am. Come over

5 behind me.

6 MR. FARRAH: I can see.

7 A. Do you see that beginning at, you see at 10:35

8 that there is a value of .22 something?

9 Q. I do.

10 A. And do you see that that value of .22 something

11 is continued all the way up to 11:35, from 10:35

12 to 11:35?

13 Q. Yes.

14 A. Okay. You know from your past experiences that

15 those, that that's called a plateau phase?

16 Q. Correct.

17 A. That means that it stays right at that plateau.

18 It's not going up and it's not coming down. And

19 the reason for that is because the enzyme

20 systems in the body are overwhelmed by the

21 amount of alcohol that is there and that it

22 would make no difference if there were a hundred

23 more drinks in there because the enzymes can no

24 long metabolize the ethanol because the enzymes

194

1 are saturated. So taking out one beer is not

2 going to change that plateau because it's still

3 saturated.

4 It took a whole hour to burn off

5 enough alcohol for that plateau to start to come

6 down. And those drinks that are peaking around

7 10:35 are the ones that were ingested

8 approximately an hour to 90 minutes earlier

9 because those are the ones that were the last

10 couple of drinks when I had the 60 minute-time

11 period. So the drinks that he had later on are

12 so overwhelming his ability to metabolize it,

13 that if he missed one beer earlier in the

14 evening because it went to Mr. Espey -- is that

15 his name? -- instead of to Mr. Southworth, he's

16 still got so much alcohol in his system that he

17 can't metabolize it all. It takes a whole hour

18 before he even starts to come down.

19 Q. It's your testimony that using the proper

20 Widmark Formula, that if I were to give every

21 drink you gave him that night and I was to

22 assume the exact same absorption rate that you

23 assumed, and the only thing that I changed was

24 that I didn't put a beer in him at 9:50, the

195

1 25-ounce beer.

2 MR. BIKOFSKY: It should be 8:50.

3 Q. It should be 8:50. Let me start it again.

4 If I took your calculations that you

5 put in your expert report here and the only

6 thing I changed was I took out the beer that was

7 served as you say at 8:50, you're going to tell

8 me that his blood alcohol at 9:35 would not be

9 significantly different than the .1493 that you

10 came up with?

11 MR. FARRAH: Objection.

12 A. Ask me that again, please, while I have these

13 documents in front of me.

14 Q. What would be his blood alcohol at 9:35 if the

15 only thing you changed in your calculations was

16 you took out the 25-ounce Bud Light beer that he

17 had at 8:50?

18 MR. FARRAH: Objection.

19 A. At 8:50, what would be his blood alcohol at what

20 time, sir?

21 Q. 9:35.

22 A. It would be about .15, I think.

23 Q. If you took that drink out, he would be higher

24 than he would having already drank that drink?

196

1 A. At 9:35, he is about .16.

2 Q. Maybe I'm looking at a different document.

3 I have the document here that says

4 here at 9:35 he's .1493.

5 A. All right. This is a better readout. And you

6 want to know if you took out that one drink at

7 8:20?

8 Q. Yes. 8:50?

9 A. 8:50. He might be a couple of points, he might

10 be .02 or so lower.

11 Q. How about closer to .01?

12 MR. FARRAH: Objection.

13 A. .01 lower.

14 Q. Yes.

15 A. If you want .01 lower, okay.

16 Q. Do you think it would be closer to .01 based on

17 your training and experience?

18 MR. FARRAH: Objection.

19 A. Well, if he drank that on an empty stomach, 60

20 minutes later it would have been .02. It should

21 be about, it should be a little higher at 30

22 minutes.

23 Q. I'm going to show you the EZ-ALC V2.0 Calculated

24 Blood Alcohol Concentration Chart. I want you

197

199

1 to look at this document.

2 A. Just hand it to me.

3 MR. FARRAH: Is there a copy for me?

4 Finishing up, I'm waiting until you finish up to
5 get a copy.

6 Q. I'll make one if you want.

7 A. Okay. Go ahead.

8 Q. And that assumes that your R that you assigned
9 him of .64, correct?

10 A. Yes.

11 Q. That assumes the same assumptions as yours,
12 correct?

13 MR. FARRAH: Objection.

14 A. Basically.

15 Q. And it puts the drinks in at exactly the same
16 time that you put them in with the same rate of
17 absorption, correct?

18 A. No. There's something wrong here. I see what
19 it is. You left out one drink on this.

20 Q. At what time?

21 A. You left out the 8:50 beer.

22 Q. Right. That's what I'm saying. If everything

23 was the same except for the 8:50 drink, what

24 would be, according to the proper Widmark

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1 Formula, his BAC at 9:35?

2 MR. FARRAH: Objection.

3 A. This one says a little over .10.

4 Q. Do you have any reason to doubt that?

5 MR. FARRAH: Objection.

6 A. .04 is an awfully big drop.

7 Q. Well, .04 is what you ascribed to a 25-ounce
8 beer, right?

9 A. No, it wasn't. I said .02 at 60 minutes.

10 Q. That's after it's been able to burn off a little
11 bit as well, correct? But the beer itself is
12 equivalent a .04, correct?

13 A. I didn't say that at all.

14 MR. FARRAH: Objection.

15 A. There's -- I told you that it would be .02 at 60
16 minutes. There's always contemporaneous burn
17 off.

18 Q. What is different between that calculation and
19 your calculation other than the removal of the
20 25-ounce Bud Light at 8:50?

21 A. They're essentially the same.

22 Q. And according to the Widmark, that would drop it
23 all the way down to .1 something, correct?

24 MR. FARRAH: Objection.

1 A. That's what this graph says.

2 Q. Do you have any reason to doubt it?

3 A. Yes, I do. He would not, Southworth would not
4 have a .04 difference from one drink.

5 MR. FARRAH: Shall we call it quits?

6 THE WITNESS: It's 4:30.

7 MR. GILLIS: Okay.

8 VIDEO OPERATOR: It's 4:29 p.m. and w
9 are now off the record.

10 (Exhibit 8 marked for identification.)

11 (Whereupon the deposition suspended at 4:29
12 p.m.)

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SIGNATURE PAGE/ERRATA SHEET

Re: Rosario vs. Rare Hospitality International,
Inc., d/b/a Longhorn Steakhouse

Date: January 26, 2007

Deposition of: David M. Benjamin

I, David M. Benjamin, do hereby certify
that I have read the foregoing transcript of my
testimony and further certify that it is a true
and accurate record of my testimony (with the
exception of the following changes listed
below):

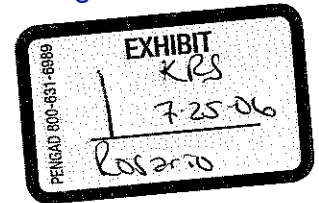
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Signed under the pains and penalties of
perjury this day of , 2007.

David M. Benjamin

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS



NANCY ROSARIO, INDIVIDUALLY,
AS SHE IS THE ADMINISTRATRIX OF
THE ESTATE OF AWILDA SANTIAGO,
ESSEX PROBATE COURT DOCKET
#03P-2499AD1, P/P/A VERONICA
ROSARIO AND CHRISTINA SANTIAGO,
AND AS SHE IS THE ADMINISTRATRIX
OF THE ESTATE OF JOSE SANTIAGO,
BERLIN (CONNECTICUT) PROBATE
COURT, CASE #03-0713

Plaintiff

v.

RARE HOSPITALITY INTERNATIONAL,
INC. d/b/a LONGHORN STEAKHOUSE

Defendant

Civil Action Number:
05-CV-10617MLW

**NANCY ROSARIO'S ANSWERS TO INTERROGATORIES PROPOUNDED BY RARE
HOSPITALITY INTERNATIONAL, INC. D/B/A LONGHORN STEAKHOUSE**

Nancy Rosario ("Nancy") objects and responds to RARE Hospitality International, Inc.
d/b/a Longhorn Steakhouse ("RARE") Interrogatories as follows:

General Objections

1. Nancy objects to so much of the Interrogatories as would require her to
provide information beyond the scope of discovery permitted by the Federal Rules of
Civil Procedure.

2. Nancy objects so much of the Interrogatories would require her to disclose
information protected by the attorney-client privilege, information contained in
attorney's work product or materials produced solely for the use by her in anticipation of

litigation.

3. Nancy objects to the Interrogatories on the grounds that they are ambiguous, vague, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

4. Nancy objects to the Interrogatories as discovery in this matter is ongoing. Nancy continues to discover additional facts that may support her claims in this case.

Interrogatories

1. Please state your full name, address, date of birth, social security number, name and address of your employer and your job title.

A. Nancy Rosario; 4A Fulton Street, Lawrence, MA 01841; March 20, 1974; 027-56-8914; homemaker and mother.

2. Please list each and every fact known to you supporting your allegation that Jeffrey Southworth was served alcohol while visibly intoxicated at the Leominster LongHorn on September 26, 2003.

A. Objection. This interrogatory is overbroad and unduly burdensome. This question calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says discovery is still ongoing, and the defendant has not produced responsive documents. The answer to this question, which is in part a matter of expert opinion interpreting facts about which the plaintiff has no personal knowledge, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action.

By way of further answer and without waiving any objections, plaintiff says Jude Connelly, a member of Southworth's party that evening who was not drinking, has testified that, at that time of the service of the last drink to him at the LongHorn, Southworth was exhibiting visible signs of intoxication.

According to Jude Connelly, Southworth consumed one 12 ounce beer around dusk, after dirt biking and then two 25 ounce beers at the Longhorn bar between approximately 8:00 and 8:30 p.m. According to the audit report supplied by RARE, from 8:40 p.m. until 9:24 pm, the Southworth party of six was served seventeen Jack Daniels Manhattans and two 25 ounce beers. According to Jude Connelly, Southworth consumed up to four 25 ounce beers with his meal. According to Leigh Chabot, the Longhorn waitress serving the party, Southworth consumed three Jack Daniels Manhattans with his meal.

Plaintiff's expert, David Benjamin, has made an affidavit in this matter, to which RARE is referred, and all of the opinions of which are incorporated by reference herein, (as is the answer to interrogatory 20, below) in which he states he is of the opinion, to a reasonable degree of scientific certainty, that Jeffrey Southworth was intoxicated and exhibiting visible signs of intoxication at the Longhorn Steakhouse at the time of the service of the last drink to him.

Connelly's observations were that Southworth didn't hold himself the same way he usually did (i.e., was not standing straight), was sloppier than usual, was louder than usual (Southworth was generally quiet and did not speak until spoken to), indeed was so loud that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy. As detailed in his affidavit, Mr. Benjamin also bases his opinion that Southworth was exhibiting visible signs of intoxication on the size, composition and the rate of consumption of the drinks the Longhorn served and that Southworth consumed.

3. Please identify all visible signs of intoxication exhibited by Jeffrey Southworth while at the Leominster LongHorn on September 26, 2003, specifying individually for each sign the identity of the person(s) making the observation; exactly what was observed or heard; the time; and where Jeffrey Southworth was when the observation was made.

A. Objection. This interrogatory is overbroad and unduly burdensome. This question calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says discovery is still ongoing, and the defendant has not produced responsive documents. The answer to this question, which is in part a matter of expert opinion interpreting facts about which the plaintiff has no personal knowledge, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action.

By way of further answer and without waiving any objections, plaintiff says Jude Connelly, a member of Southworth's party that evening who was not drinking, has testified that, at that time of the service of the last drink to him at the LongHorn, Southworth was exhibiting visible signs of intoxication.

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Plaintiff's expert, David Benjamin, has made an affidavit in this matter, to which RARE is referred, and all of the opinions of which are incorporated by reference herein, (as is the answer to interrogatory 11, below) in which he states he is of the opinion, to a reasonable degree of scientific certainty, that Jeffrey Southworth was intoxicated and exhibiting visible signs of intoxication at the Longhorn Steakhouse at the time of the service of the last drink to him.

Connelly's observations were that Southworth didn't hold himself the same way he usually did (i.e., was not standing straight), was sloppier than usual, was louder than usual (Southworth was generally quiet and did not speak until spoken to), indeed was so loud that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy. As detailed in his affidavit, Mr. Benjamin also bases his opinion that Southworth was exhibiting visible signs of intoxication on the size, composition and the rate of consumption of the drinks the Longhorn served and that Southworth consumed.

4. Concerning the time period between 12:00 PM on September 26, 2003 and 12:10 AM on September 27, 2003, please set forth as best as you are able a verbatim recitation of each and every conversation between you and Jose Santiago setting forth what was said and by whom; the time of each such conversation and identifying each and every person present for any such conversation.

A. Jose and I had three conversations on September 26, 2003. The first took place on the telephone, at about 2:45 p.m. Jose told me he would be at my house around 8:00 p.m. that evening to pick up the girls for the weekend. I told him that was fine.

The second conversation was by telephone, also, and took place around 9:00 to 9:30 p.m. I asked Jose where he was. He replied he had a flat tire and that was why he was late, but that he would be at my house shortly.

The third conversation took place outside my house when he arrived, around 10:30. Jose apologized to me for being late and asked if the girls were still awake. I replied that they were awake and that I had made a meal for them to take in the event anyone got hungry on the ride and that I would pack it up, which I then did. While I was doing that and getting the girls ready, Jose spoke to Jose Garcia, and shook his hand and said he didn't want to fight with Jose Garcia any more, that Jose Garcia was doing a good job raising the girls and thanked him for that. A short while later, they left. Present that evening were Jose Santiago, Julia Schmidt, Jose Garcia, the girls and Eileen Rosario.

5. Insofar as you, your servants, agents, employees, attorneys and insurers are aware, please set forth in full and complete detail all facts known to you supporting your allegation that Jeffrey Southworth was visibly intoxicated when served any alcoholic beverage at the Leominster Longhorn on September 26, 2003. For each fact or allegation recited in your answer, state the name, address, employer, job title and business address of each and every person who was consulted and/or who conveyed this information to you; for each fact or allegation recited in your answer identify (by title, author, number of pages, and current location) all documents consulted and/or relied upon in support of said facts and/or allegations.

A. Objection. This interrogatory is overbroad and unduly burdensome. This question calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says discovery is still ongoing, and the defendant has not produced responsive documents. The answer to this question, which is in part a matter of expert opinion interpreting facts about which the plaintiff has no personal knowledge, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action.

By way of further answer and without waiving any objections, plaintiff says Jude Connelly, a member of Southworth's party that evening who was not drinking, has testified at deposition and made an affidavit that, at that time of the service of the last drink to him at the LongHorn, Southworth was exhibiting visible signs of intoxication.

According to Jude Connelly, Southworth consumed one 12 ounce beer around dusk, after dirt biking and then two 25 ounce beers at the Longhorn bar between approximately 8:00 and 8:30 p.m. According to the audit report supplied by RARE, from 8:40 p.m. until 9:24 pm, the Southworth party of six was served seventeen Jack Daniels Manhattans and two 25 ounce beers. According to Jude Connelly, Southworth consumed up to four 25 ounce beers with his meal. According to Leigh Chabot, the Longhorn waitress serving the party, Southworth consumed three Jack Daniels Manhattans with his meal.

Plaintiff's expert, David Benjamin, has made an affidavit in this matter, to which RARE is referred, and all of the opinions of which are incorporated by reference herein, (as is the answer to interrogatory 20, below) in which he states he is of the opinion, to a reasonable degree of scientific certainty, that Jeffrey Southworth was intoxicated and exhibiting visible signs of intoxication at the Longhorn Steakhouse at the time of the service of the last drink to him.

Connelly's observations were that Southworth didn't hold himself the same way he usually did (i.e., was not standing straight), was sloppier than usual, was louder than usual (Southworth was generally quiet and did not speak until spoken to), indeed was so loud that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy. As detailed in his affidavit, Mr. Benjamin also bases his opinion that Southworth was exhibiting visible signs of intoxication on the size, composition and the rate of consumption of the drinks the Longhorn served and that Southworth consumed.

6. For each of your employers from January 1, 1998 to the present, please state their names and addresses; your rate of pay; a description of your job duties; the identity of your supervisor(s); the reason(s) for leaving each position; and the dates between which you were employed.

A. During this period I was employed for approximately two months at Dunkin Donuts, serving coffee and doughnuts to customers at a store on South Broadway in Lawrence, MA. I was earning a minimum wage, the exact amount of which I cannot recall, and receiving tips. I left this job because I didn't enjoy it.

I was subsequently employed for approximately a year by Gillette, working in both Andover and Acton, MA. At that job, which involved packing products into boxes, I earned take home pay of up to \$600 per week, depending on the number of hours I worked each week. I left that job because I was unable, after a time, to continue to physically perform the work because of an arthritis condition. I cannot remember the names of my supervisors at either job.

7. Identify every insurer (including, without limitation, health insurers, disability insurers, and liability insurers) to which you, or persons acting on your behalf, have submitted claims for benefits as a result of the incident.

A. None, other than making claim in Middlesex Superior Court against Jeffrey Southworth and Enterprise Rent a Car of Boston, Inc. Various medical bills have been paid by Medicaid and Neighborhood Health Plan.

8. If you have suffered financial loss as a result of the alleged accident or incident, please set forth said loss in specific detail, itemizing any and all claimed losses, including doctor's bills, nurse's bills, hospital expenses, funeral expenses, therapy expenses, and any loss in wages, salary or business.

A. My medical bills have been paid by Medicaid and, I believe, Neighborhood Health Plan. Awilda's estate has incurred \$9,509.75 in funeral expenses.

9. Please set forth the identity of each person who has conducted an inspection or investigation of the scene of the incident, stating as to each such person the date or dates on which such inspections occurred, the identity of anyone present, and whether any photographs or videotapes were taken in connection with the inspection.

A. Objection. This interrogatory is over broad and unduly burdensome. This question in part calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. By way of further answer, I have no personal knowledge of the identities of each person who has conducted an inspection or investigation of the scene of the incident, other than my attorneys.

10. Please set forth the identity of each person who has conducted an inspection or investigation of the Leominster LongHorn, stating as to each such person the date or dates on which such inspections occurred, the identity of anyone present, and whether any photographs or videotapes were taken in connection with the inspection.

A. Objection. This interrogatory is over broad and unduly burdensome. This question in part calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. By way of further answer, I have no personal knowledge of the identities of each person who has conducted an inspection or investigation of the Leominster LongHorn, other than my attorneys and persons working on their behalf, including Michael Marcantonio.

11. If you, your attorney, insurers, or other representatives have taken the written or recorded statement of any person relative to the allegations set forth in the complaint, please

state the name, address, employer and job title of each person whose statement was taken, the date that each such statement was taken, as well as the name, address, employer and job title of the person(s) who took each such statement.

A. Objection. This interrogatory is over broad and unduly burdensome. This question in part calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. By way of further answer, I do not know of any such statements except the depositions conducted in this action.

12. Please identify every expert retained by you or someone on your behalf whom you expect to offer expert testimony on behalf of you and/or any other plaintiff, specifying for each such person; the subject matters on which he or she is expected to testify; the substance of the facts and opinions to which he or she is expected to testify; and the grounds for each opinion he or she is expected to express.

A. Plaintiff may call some or all of the following persons as expert witnesses, and reserves the right to call other experts not listed below. Plaintiff will supply all expert reports on or before the deadlines set forth in joint scheduling order entered in this action.

Lloyd F. Price, M.D., 152 Holdenwood Road, Concord, MA 01742

David Benjamin, Ph.D., 77 Florence Street, Suite 107N, Chestnut Hill, MA 02467

Michael Marcantonio, Dram Shoppe Consultants, 25 Sylvester Road, Natick, MA 01760

Trooper Kerry A. Alvino, Massachusetts State Police, Collision Analysis and Reconstruction Section, 485 Maple Street, Danvers, MA, (978) 538-6065

13. At any time since the date of your marriage to Jose Santiago, please state whether you or Jose Santiago commenced any proceeding for separate support, divorce, separation or

other limitation or termination of the marital relationship, and if so please state the date of each such proceeding; the court in which the same was filed; the docket number of each such proceeding; and the final result of each such proceeding.

A. We never married.

14. If at any time from the date of your marriage to Jose Santiago until his death, you and Jose Santiago had lived apart or in separate residences, please provide a complete description of each such separation, including the dates, the reasons for such separation, the address where both you and he resided at the time of separation and the full name and address of each person either party lived with during the time of said separation.

A. We never married.

15. Describe in complete detail all acts of companionship, support, society, sexual relationship and/or other contacts with your spouse which you allege were lost or impaired as a result of the alleged incident.

A. We never married.

16. Describe in complete detail all special acts of companionship, support, society and/or other contacts with your child, Awilda Santiago which you alleged were lost or impaired as a result of the alleged incident.

A. Objection. This question calls for work product and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says the answer to this question, which is in part a matter of expert opinion, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action. By way of further answer plaintiff says:

Awilda was a wonderful, caring child and an excellent student. She shared what she had with me, her siblings and friends. Awilda was my regular companion. We did virtually everything together. Awilda exhibited a great sense of responsibility in our home. She enjoyed cooking, and would often prepare dinner for her sisters, me and her aunts and uncles. I could rely on her to baby sit her sisters and brother if I needed to take a nap. Awilda would take charge of her siblings in the mall, while shopping or when escorting her siblings to the movie theater and skating. In school, Awilda was often caretaker to her two sisters. She excelled in the school environment and enjoyed attending classes and interacting with her teachers. Awilda was proficient in the use of a computer and had expressed a desire to attend the Greater Lawrence Vocational High School, where she planned to study computers. It was my hope that Awilda would have received a college education and pursued and enjoyed a successful career, perhaps in the information technology field. Awilda's sisters and I were her best friends. Even if she married, at some point I believe Awilda would have wanted me to live with her and her family.

Awilda's records were reviewed by Catharine Newick, Business Decisions Services, 29 River Rd. #8, Bow, NH 03304, who has prepared a report of her findings and opinions. Her report will be will be provided as an expert report by plaintiff pursuant to the discovery order entered in this action.

17. Please state the full name and date of birth of all of your biological children, including separately for each, the full name and address of their biological father.

A. With Jose Santiago

Awilda: June 16, 1990

Christina: May 23, 1991

Veronica: May 16, 1992

With Jose Garcia

Esmerlelda: January 22, 1998
Alejandro: June 29, 1999

18. Please identify all persons to whom you have been legally married, specifying for each, their name, date of birth, the place of marriage, and the manner in which the marriage was terminated.

A. I have never married.

19. Please state in detail all facts which show that the defendant, RARE Hospitality International, Inc. was negligent, as alleged in the complaint, in the sale, service and/or distribution of alcohol to Jeffrey Southworth on September 26, 2003 and how this alleged negligence caused or contributed to the deaths of Jose Santiago and Awilda Santiago and the injuries sustained by Veronica Rosario and Christina Santiago.

A. Objection. This interrogatory is over broad and unduly burdensome. This question calls for work product, expert opinions, interpretations of questions of law, the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says discovery is still ongoing, and the defendant has not produced responsive documents. The answer to this question, which is in part a matter of expert opinion interpreting facts about which the plaintiff has no personal knowledge, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action.

By way of further answer, and without waiving any objections, plaintiff says that a tavern keeper has a duty to refuse to serve liquor to a patron whom the tavern keeper knows or should know is intoxicated. A breach of that duty will result in liability because it is a foreseeable risk that a person who had consumed liquor excessively on the premises would operate a motor

vehicle and that it is negligence for a licensee such as RARE to serve alcoholic beverages to a person RARE knew, or should have known, was under the influence of intoxicating alcohol. Southworth was highly intoxicated at the time of the accident. Discovery to date in this action and in Rosario v. Southworth, et al, Middlesex Superior Court CA 03-4704L2, shows that between approximately 8:00 p.m. and 9:30 p.m., the approximate time of the service of the last drink to Southworth's party, while a patron at the Leominster Longhorn Restaurant, Southworth was served as many as six 25 oz. beers, and no fewer than three 25 oz. beers, as well as at least three Jack Daniels Manhattans.

At the time of the service of the last drink, Southworth was exhibiting various signs of intoxication. According to Jude Connelly, who was the only member of Southworth's group not drinking alcoholic beverages since he was underage, during the meal Southworth was displaying signs of intoxication. Southworth appeared to be under the influence of what he had been drinking. In Connelly's view, at the time of the service of the last drink to him, Southworth was sloppier looking than usual, was not standing straight, was louder than usual (he was usually quiet, only speaking when spoken to) and his eyes were glassy. The Southworth party was so loud that evening that at approximately 9:30 p.m., the time of service of the last drink to the table, either a restaurant manager or waitress was forced to request that the table quiet down. Michael Espey, another member of Southworth's party that night, started drinking alcoholic beverages at 4:00 or 5:00 in the afternoon. Despite that, in his own words, he was "drunk" while at the Longhorn, he was served at least a Manhattan and a beer. David Benjamin calculates that Southworth, if he consumed three Jack Daniels Manhattans (containing 1 and 1/2 ounces of Jack Daniels and 3/4 ounce of sweet vermouth), two 25 ounce beers at the bar and four 25 oz beers at the table, had a BAC of approximately 0.22% at 9:30 p.m., the approximate time he was served

his last drink. He calculates that Southworth, if he consumed three Jack Daniels Manhattans (containing 1 and ½ ounces of Jack Daniels and ¾ ounce of sweet vermouth), two 25 ounce beers at the bar and the two 25 oz beers at the table, had a BAC of over 0.18% at 9:30 pm, the approximate time he was served his last drink. He is also of the opinion, to a reasonable degree of scientific certainty, that 95% of non-alcoholic individuals with a BAC over 0.20%, and 89% of individuals with a BAC between 0.15% and 0.20%, show visible signs of intoxication.

The Leominster Longhorn, which is surrounded by a generous parking lot, is a destination that virtually all of its customers reach by motor vehicle. It is the plaintiff's position that any responsible purveyor of alcoholic beverages would know, or should have known, the profoundly intoxicating effect the quantities of alcoholic beverages served that evening by RARE employees to Southworth would have on him, and that those effects would stay with Southworth, impairing his judgment and his ability to operate a motor vehicle, for hours after he left the restaurant.

Indeed, the debilitating effects of over serving alcoholic beverages and guidelines for gauging the amount of alcohol a patron has ingested, and should, if any, be served, are contained in the various Bar Code materials RARE has produced in this case, guidelines RARE negligently failed to enforce and it's employees negligently failed to observe.

As David Benjamin has already opined, based on the fact that even with Southworth's large body mass of 210 lbs, he would be able to burn off only one half of a 25 oz beer in an hour, to serve him up in 1 1/2 hours drinks, of the size and at the rate described above, the Longhorn Steakhouse personnel knew or should have known that Southworth would accumulate the ethanol in all drinks above one half of a 25 oz beer per hour and that his blood alcohol content (BAC) would rapidly rise, due to the rapid rate of service and consumption of ethanol, and that it is a scientific fact that an individual reaches a point when his/her enzymes that metabolize

ethanol become saturated and cannot metabolize any greater amount of ethanol. The result is that the ethanol accumulates in the blood and causes an increasing level of intoxication as the rate of consumption and absorption exceeds its rate of metabolism and elimination. This is called a "kinetic bottle-neck" and is similar to pouring water into a funnel. One can pour more water in or pour it at a faster rate, but the water will only come out of the funnel at the same rate all the time, due to the fixed size of the opening on the stem of the funnel. As more water is poured into the funnel it accumulates.

After leaving the Longhorn, Southworth's BAC continued to rise. See Mr. Benjamin's affidavit for more details. Numerous studies have concluded, and Mr. Benjamin's personal experience confirms, that a person with a BAC of approximately 0.20% is in a confusional stage of intoxication, marked by disorientation, mental confusion, loss of critical judgment, sensory-motor incoordination, dizziness, disturbances of vision and perception of colors, form, motion and dimensions and increased muscular in-coordination, all of which affect the ability of a person to operate a motor vehicle. As the result of RARE's negligence (and indeed gross negligence) in serving Southworth on the evening in question, he was intoxicated and impaired at the time of the accident, which intoxication and impairment were substantial contributing causes of the accident and the deaths and injuries suffered.

Furthermore, RARE, despite that it knew that many of its customers, such as Southworth, first drank at the Longhorn bar before proceeding to the table, negligently had no system in place on the night in question to monitor the total number of drinks a patron consumed while a customer, or a requirement that bartenders communicate with waitresses the number and type of drinks customers have consumed at the bar before being seated at a table; RARE negligently was serving, and indeed served Southworth, what were "double", and potentially "triple" drinks, in

the form of the 25 ounce beer and the Jack Daniels Manhattan served straight up in a six ounce glass filled to within one quarter inch of the lip, and not training employees to recognize this fact; RARE negligently allowed bartenders to free pour drinks without determining whether those bartenders were capable of accurately estimating the amount of alcohol poured, and they were not; RARE negligently failed, after implementing a policy of requiring its bartenders to pass an Exacto Pour test every shift, to administer the test; RARE negligently failed, after implementing the various policies described in its Bar Code training and service materials, to carry out those procedures and negligently permitted the over serving of Southworth on the evening in question, a clear violation of the Bar Code responsible alcohol service procedures; RARE negligently employed personnel who served Southworth, who were not properly trained in responsible service of alcoholic beverages, and who, among others, did not know the potency of the drinks they made and served Southworth; RARE negligently failed to require its employees know the potency of those drinks, and negligently failed to train or retrain employees in these matters.

20. Please state in detail all facts or information known to you as to whether Jeffrey Southworth consumed any alcoholic beverage between the time he left the Leominster LongHorn on September 26, 2003 and the time of the accident with Jose Santiago, specifying the amount of alcohol consumed, the time said alcohol was consumed, the type of alcohol consumed, the brand of alcohol consumed, the place the alcohol was consumed and the supplier of the alcohol.

A. Objection. This interrogatory is over broad and unduly burdensome. This question calls for work product, expert opinions, interpretations of questions of law, the mental impressions of my attorneys and general information beyond that which is discoverable by way

of interrogatories. By way of further answer, I have no personal knowledge that Jeffrey Southworth consumed any alcoholic beverage between the time he left the Leominster LongHorn on September 26, 2003 and the time of the accident with Jose Santiago. I understand that one or more witnesses testified at deposition that, during that time frame, Jeffrey Southworth consumed one 12 ounce beer.


21. With respect to your claim for punitive damages, please set forth each and every fact supporting your claim that the Defendant was grossly negligent.

A. Objection. This question calls for work product, expert opinions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. Without waiving that objection, plaintiff says discovery is still ongoing, and the defendant has neither responded to plaintiff's request for production of documents nor produced responsive documents. Once such production has occurred, the answer to this question, which is a matter of expert opinion interpreting facts about which the plaintiff has no personal knowledge, will be provided in the expert reports supplied by plaintiff pursuant to the discovery order entered in this action. By way of further answer, plaintiff says the negligence described in answer 19., above, which is incorporated by reference herein, amply supports a claim of gross negligence or wanton and reckless conduct.

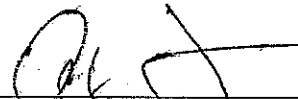
22. Please describe in detail the negligence of any third party which may have caused or contributed to the happening of the accident of September 26, 2003 in any way.

A. Objection. This question calls for work product, expert opinions, legal conclusions and the mental impressions of my attorneys and general information beyond that which is discoverable by way of interrogatories. By way of further answer, suit was brought by me against Jeffrey Southworth alleging negligence.

Signed under the pains and penalties of perjury this 13 day of July, 2006.


Nancy Rosario

As to all objections:


Albert L. Farrah, Jr.

CERTIFICATE OF SERVICE

SUFFOLK, SS

July 14, 2006

An original of Nancy Rosario's Answers to Interrogatories Propounded by RARE Hospitality International, Inc. d/b/a Longhorn Steakhouse was ~~hand-delivered~~ today, postage prepaid to Michael Gillis, Esq., Gillis & Bikofsky, P.C., 1150 Walnut Street, Newton Highlands, MA 02461.

via Federal Express


Albert L. Farrah, Jr., Esq.

Section 5

UNDERSTANDING THE PHARMACOLOGY OF ETHANOL

David M. Benjamin, Ph.D.
Clinical Pharmacologist and Forensic Toxicologist, Chestnut Hill

I. HOW TO DEVELOP YOUR CASE FROM A PHARMACOLOGIC PERSPECTIVE

In my experience, there is only one method to use when evaluating a potential Dram Shop case, regardless of whether you are representing the plaintiff or the defendant. That method involves developing a chronology of the eating and drinking that occurred within the time frame of the day/evening in question.

The driver of the car involved in any accident that occurred and appropriate fact witnesses will be able to relate some information regarding the time they got to the establishment(s) that was patronized, what the driver was drinking and eating at each establishment, how many drinks, and at what time the driver left the establishment(s). Often there are copies of cash register receipts, bills, credit card receipts, or other written materials which help establish the chronology. Police reports can help establish the time of an accident, and hospital records can help establish an individual's Blood Alcohol Concentration (BAC) at a specific time.

Sometimes, people have ingested so much ethanol that they can't remember what happened, or sustained head injuries that prevent them from remembering what happened. It is then necessary to take the depositions of the fact witnesses who were with the driver at various times prior to the accident to help develop a timeline.

The question both plaintiffs and defendants want to answer is "Was the driver visibly intoxicated when he/she was served his/her last drink?" Security cameras also may be helpful in establishing the driver's conduct and appearance while in the establishment, but many times, the chronology will have to be developed from witness statements and depositions.

Let's take a hypothetical case and develop it. Assume John Smith is 5'10" tall and weighs 175 lbs. On the day of the accident, Mr. Smith leaves work early and goes to the local pub just before 1 pm for lunch. He orders a 12 oz. Bud Light beer and some Buffalo Wings. At 1:45 pm, he orders another beer, which is

follows with a "1.5 oz. shot of tequila". He orders another beer at 2 pm and a fourth beer at 3 pm, followed by another "1.5 oz. shot of tequila". He orders a burger and some fries at 3:30 pm and another beer at 4:30 pm and a final beer at 5 pm. He leaves the establishment at approximately 5:30 pm and is involved in a motor vehicle accident at 5:55 pm.

Chronology:

1 pm - 12 oz. Bud Light beer and some Buffalo Wings.
 1:45 pm - another Bud Light beer
 1:55 pm - 1.5 oz. shot of tequila
 2 pm - another Bud Light beer
 3 pm - a fourth Bud Light beer
 3:10 pm - another 1.5 oz. shot of tequila
 3:30 pm - a burger and some fries
 4:30 pm - a fourth Bud Light beer
 5 pm - a final Bud Light beer
 approximately 5:30 pm - he leaves the establishment
 5:55 pm - he is involved in a motor vehicle accident

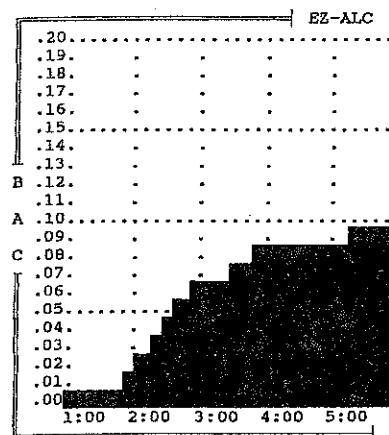
Inputting the above data into the Widmark formula, the graph in Figure 1 was generated. This graph indicates that at 5 pm, the time the last drink was ordered, the hypothetical driver had a BAC of approximately 0.08%. Looking at Table I, it is obvious that only 32% of the tested population was visibly intoxicated at a BAC of 0.08%, and that even at BACs between 0.10% and 0.15%, only 62% of the tested population was visibly intoxicated.

However, when you look at the next group of BACs, between 0.15% and 0.20%, approximately 89% of the tested population was visibly intoxicated. Thus, just below 0.15% up to 6 out of 10 people were visibly intoxicated, while above 0.15%, approximately 9 out of 10 people were visibly intoxicated, a 150% increase over those with BACs below 0.15%. This is why in the forensic toxicology community, the BAC which serves as the standard for visible intoxication is 0.15%. Does this mean that everyone below 0.15% will not be visibly intoxicated? Of course not. And does this mean that everyone above 0.15% will be visibly intoxicated? No, again.

Subject Name : Mr. John Smith
 Body Weight : 175 Pounds.
 Widmark Beta : .020 % per hour.
 Widmark r : .68:

Drink Number	FLOz ETOH	Start Time	Absorb Time
1	0.50	1:00	060
2	0.50	1:45	060
3	0.60	1:55	060
4	0.50	2:00	060
5	0.50	3:00	060
6	0.60	3:10	060
7	0.50	4:30	060
8	0.50	5:00	060
9	0.00	0:00	060
10	0.00	0:00	060
11	0.00	0:00	060
12	0.00	0:00	060

HOME for menu, H for Help, C for



ANY KEY to return to DataScreen

He orders another beer at 2 pm and a
er "1.5 oz. shot of tequila". He orders a
iother beer at 4:30 pm and a final beer at
proximately 5:30 pm and is involved in a

Buffalo Wings.

establishment
icle accident

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ation was visibly intoxicated. Thus, just
e were visibly intoxicated, while above
le were visibly intoxicated, a 150% in-
5%. This is why in the forensic toxicol-
as the standard for visible intoxication is
below 0.15% will not be visibly intoxi-
ean that everyone above 0.15% will be

Figure 1

EZ-ALC Ver 2.0 - DataScreen							
Subject Name :Mr. John Smith				I.D.# :ZZ11Z:			
Body Weight :175: Pounds.				Initial BAC :.0000:			
Widmark Beta :.020: % per hour.							
Widmark r :.68:							
Drink Number	FLOz ETOH	Start Time	Absorb Time	Drink Number	FLOz ETOH	Start Time	Absorb Time
1	0.50	1:00	060	13	0.00	0:00	060
2	0.50	1:45	060	14	0.00	0:00	060
3	0.60	1:55	060	15	0.00	0:00	060
4	0.50	2:00	060	16	0.00	0:00	060
5	0.50	3:00	060	17	0.00	0:00	060
6	0.60	3:10	060	18	0.00	0:00	060
7	0.50	4:30	060	19	0.00	0:00	060
8	0.50	5:00	060	20	0.00	0:00	060
9	0.00	0:00	060	21	0.00	0:00	060
10	0.00	0:00	060	22	0.00	0:00	060
11	0.00	0:00	060	23	0.00	0:00	060
12	0.00	0:00	060	24	0.00	0:00	060

HOME for menu, H for Help, C for Calculator

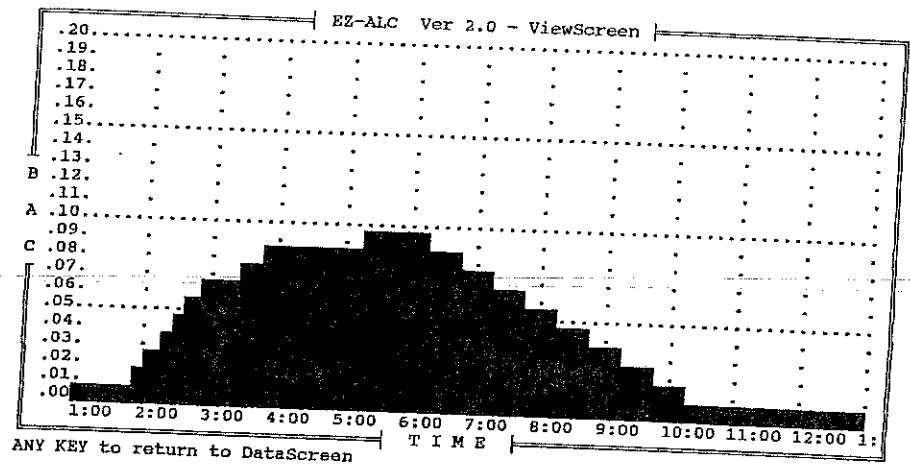


Table I
Relationship Between BAC and Intoxication*

Approximate Number of Drinks in You	Blood Alcohol Concentration	Average Percentage of Individuals Diagnosed as Drunk
1-3	less than 0.05%	4
3-5	0.051- 0.10%	32
6-8	0.101- 0.15%	62
8-10	0.151- 0.20%	89
11-13	0.201- 0.25%	95
14-16	0.251 - 0.30%	98
16-18	0.301 - 0.35%	99

*Adapted from Alcohol and the Impaired Driver, The American Medical Association, Chapter II, page 9, 1968.

As a forensic expert, I have applied the "chronology method" to all my ethanol-related cases. It makes no difference whether it is a civil case or a criminal case, and it makes no difference whether I have been retained by the defense, the plaintiff or the prosecution. Moreover, when an opposing expert has used a different method or a different set of assumptions to calculate the BAC, the ability to utilize a graph such as Figure 1 as demonstrative evidence helps to assist the jury in determining the facts at issue, as shown in Figures 2 and 3.

Sometimes, there is a blood ethanol level that was drawn at a hospital after the accident. In those instances, if it can be established that no additional ethanol was ingested after leaving the bar, it is possible to "back-extrapolate" from the hospital blood value back to a time in the last bar patronized. If a drink or shot was ingested just prior to leaving the last establishment, one can usually back-extrapolate to a time 30-60 minutes after leaving, when it can be determined that the driver was in the post-absorptive phase of ethanol disposition.

When you are lucky enough to have a subsequent BAC from a hospital, the related values can serve to confirm. However, hospital ethanol determinations are frequently analyzed by a "screen" than duplicate determinations. They (weight) but usually don't rise to the

Tragic Dram-Shop Case

When Joseph Albert was found lying on his own vomit after a night at Lowell, it seemed a classic case.

Albert had been drinking heavily. His BAC was a startling .48 - six times the

But the case was a bit more complicated. There were no witnesses, an inexplicable time delay, a mysterious bottle of liquor that was found outside of the bar.

And Albert, the plaintiff, tragically died three years after the incident.

Nevertheless, for the plaintiff's case, getting a patron enough drinks to pass a police officer who investigated the case had never seen someone whose

"When closing arguments were made, the verdict was coming back," recalled the plaintiff whose initial demand was \$11 million.

But defense attorneys Robert J. Myers of North Andover point out that at two establishments prior to arriving at the bar, he was drinking from a flask, and his blood-alcohol level skyrocketed.

¹ Reprinted with permission from Lawyers Weekly

ble I

BAC and Intoxication*

Alcohol Concentration	Average Percentage of Individuals Diagnosed as Drunk
0.05%	4
0.1%	32
0.15%	62
0.2%	89
0.25%	95
0.3%	98
0.35%	99

ed Driver, The American Medical Asso-

"chronology method" to all my ethanol. Whether it is a civil case or a criminal case, have been retained by the defense, the when an opposing expert has used a dif- ficult to calculate the BAC, the ability demon- strative evidence helps to assist the shown in Figures 2 and 3.

level that was drawn at a hospital after the be established that no additional ethanol is possible to "back-extrapolate" from the the last bar patronized. If a drink or shot at establishment, one can usually back- track leaving, when it can be determined that use of ethanol disposition.

When you are lucky enough to have both a well-founded chronology and a subsequent BAC from a hospital, the degree of agreement between the two calculated values can serve to confirm or invalidate one of the calculated values. However, hospital ethanol determinations are not done with a chain of custody, are frequently analyzed by a "screening level" test, and are only single rather than duplicate determinations. These factors can detract from their reliability (weight) but usually don't rise to the level to get them suppressed by the courts.

Figure 2**Tragic Dram-Shop Case Just Had Too Many Holes'**

When Joseph Albert was found passed out in the middle of the road choking on his own vomit after a night of drinking at Gus and Paul's Tavern in Lowell, it seemed a classic case of dram-shop liability.

Albert had been drinking heavily at the bar and his blood-alcohol level was a startling .48 - six times the legal limit for operating a car.

But the case was a bit more complicated than that. There were missing witnesses, an inexplicable time gap during the night in question, and a mysterious bottle of liquor that Albert may have purchased on his own, outside of the bar.

And Albert, the plaintiff, tragically remains in a coma more than five years after the incident.

Nevertheless, for the plaintiff's attorney, it was a case of a bartender serving a patron enough drinks to put him in a dangerous state. The Lowell police officer who investigated the incident and testified at trial said he had never seen someone whose alcohol level was so high.

"When closing arguments were done, I really thought that a plaintiff's verdict was coming back," recalls Tyngsboro attorney Peter J. Nicosia, whose initial demand was \$11 million.

But defense attorneys Robert J. Carnevale of Lowell and Andrew D. Myers of North Andover point out that not only had Albert been drinking at two establishments prior to arriving at Gus and Paul's Tavern, but afterwards he was drinking from a fifth of Jack Daniels whiskey that sent his blood-alcohol level skyrocketing. The bottle, how-ever, was never found.

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"I played that off to be basically an untrue story and basically a red herring," Nicosia says of the Jack Daniels. "The bottle was never found; no one ever saw him drink it."

Toxicologists with widely differing reports then became a focal point of the five-day trial. The plaintiff's expert calculated Albert's BAC at between .25 and .29 when he was last served at the bar, which would have meant he had close to a dozen beers during his two hours at the tavern.

The defense expert, however, put that number closer to .15 based on witnesses saying Albert consumed no more than four or five 10-ounce beers at the bar.

Prompted by a question from the jury, the experts were asked to explain the "burn-off rate" of alcohol. The plaintiff's expert used a lower rate based on total body water, which tends to yield higher BAC levels, while the defense expert used the widely accepted Widmark formula used to measure levels in people with drinking experience.

"His methodology was just undisputable," Myers says of defense expert Dr. David M. Benjamin, an expert the attorney thinks won the jury over.

The timeframe of the evening also became a crucial element for the defense, as the lawyers tried to "widen the gap" between when 28-year-old Albert left the bar and when he was found in the road at approximately 12:30 a.m. on Nov. 8, 1996.

"That was my entire closing argument," says Myers. "The first thing I said to the jury was 'There's a hole in this case,' and I tried to make the hole as big as I could."

However, the defense's main witness, John Walker (who was Albert's drinking partner that evening), could not be located. The defense, in turn, was left to rely on his deposition testimony.

Nicosia says the missing witness worked in the defense's favor at trial.

"If the jury saw Johnnie Walker on the stand and saw his complete lack of credibility, that would have been a big factor in the outcome," asserts Nicosia. "This guy was just a pull-him-off-the-barstool drudge of society." (Though Nicosia now refers to the witness as "Johnnie Walker," attorneys on both sides of the case agreed before trial to refrain from using that reference because of its connotations to the popular brand of whisky.)

Instead of Walker testifying at Walker's deposition. The testimony around 11:30 p.m., a statement Walker was keeping track of since 4 a.m. (Conversely, the witness left the bar around midnight.)

Leaving the bar at 11:30 "gave a lot of that fifth (of Jack Daniels) left at midnight and they found him in trouble with the timeline."

The plaintiff's case was also hurt at Albert's request, he had dropped. It is another theory the plaintiff's defense team says was damaging.

After only three hours of deliberation in a case that the attorneys had

Ultimately, Nicosia says the case some jurors admitting during the pathology for Albert - a young man who was chronically unemployed.

"I think they felt that the kid got him one day anyway," Nicosia says.

an untrue story and basically a red herring. "The bottle was never found; no

reports then became a focal point of the expert calculated Albert's BAC at best served at the bar, which would have during his two hours at the tavern.

that number closer to .15 based on witness testimony more than four or five 10-ounce beers

During the trial, the experts were asked to explain the plaintiff's expert used a lower rate of metabolism to yield higher BAC levels, while the defense accepted Widmark formula used to calculate BAC based on drinking experience.

Notable," Myers says of defense expert testimony the attorney thinks won the jury over.

It became a crucial element for the defense to "close the gap" between when 28-year-old Albert was found in the road at approximately

11:30 p.m., says Myers. "The first thing I did in this case," and I tried to make the

defense, John Walker (who was Albert's brother) could not be located. The defense, in turn, presented testimony.

It worked in the defense's favor at trial.

On the stand and saw his complete lack of credibility as a big factor in the outcome," asserts the plaintiff's expert. "The all-him-off-the-barstool drudge of society to the witness as 'Johnnie Walker,' at the agreed before trial to refrain from using allusions to the popular brand of whisky.)

Instead of Walker testifying, it was a young attorney reading from Walker's deposition. The testimony stated that the pair left the bar at around 11:30 p.m., a statement the defense supported by claiming that Walker was keeping track of time that evening because he had been up since 4 a.m. (Conversely, the plaintiffs witnesses all claimed that Albert left the bar around midnight.)

Leaving the bar at 11:30 "gave them plenty of time for Joey to consume a lot of that fifth (of Jack Daniels) that he left with," says Carnevale. "If he left at midnight and they found him at 12:30 [a.m.], we would have been in trouble with the timeline."

The plaintiff's case was also hurt by testimony from Walker stating that, at Albert's request, he had dropped his passenger off with two prostitutes. It is another theory the plaintiff's attorney calls a red herring, but one the defense team says was damaging to the plaintiffs character in the end.

After only three hours of deliberating, the jury returned a defense verdict in a case that the attorneys had been working on for six years.

Ultimately, Nicosia says the case was an uphill battle from the start, with some jurors admitting during the selection process that they had no sympathy for Albert - a young man with a history of alcohol problems who was chronically unemployed.

"I think they felt that the kid got what eventually was going to happen to him one day anyway," Nicosia says disappointedly.

Figure 3

Jurors' Right to Question Testifying Expert Rights Lawyers' Wrongs

David M. Benjamin, Ph.D.

(Presented at: American Academy of Forensic Sciences, Jurisprudence Section, Las Vegas, NV, February 20, 2004) In the Commonwealth of Massachusetts, judges may permit jurors to question testifying experts about unresolved issues not covered in direct testimony or cross-examination. At the conclusion of the expert's testimony, some Superior Court judges ask jurors if they have any questions to ask of the forensic expert. If so, the jurors are asked to write down their questions and submit them to the court. The judge calls the lawyers over to a side bar and reviews the questions with the attorneys. If one party has an objection to a question, it is raised at side bar, if both parties agree on a question, it is read to the expert by the judge and the expert has an opportunity to respond. The advantage of allowing jurors to question experts is proven by the results of a recent trial in which this author served as an expert for the defense on the toxicology of ethanol. The case involved a Dram Shop litigation. Dram Shop cases involve an allegation that a restaurant or bar served liquor to a patron who was already exhibiting visible signs of intoxication at the time that drink was served, and that patron then left the establishment and drove a motor vehicle that was subsequently involved in an accident where personal injury and/or property damage occurred. If it is proven that the patron was visibly intoxicated at the time the liquor establishment served him/her ethanol, then the bar or restaurant is civilly liable for the damages caused by the intoxicated driver.

Facts of the case: JA was a middle-aged male with a long history of alcohol abuse. On the night in question, JA was drinking at a local pub. During the course of the evening, JA left the bar with a friend, purchased a fifth of Jack Daniels, and returned to the bar where he met another friend. JA left the bar with the second friend and while driving around, they encountered two women who were "looking for company". JA got out of the car to join the women. Several hours later, JA was found on the street, barely able to crawl or talk. Paramedics were summoned to the scene and JA was taken to the hospital reeking of liquor and only semiconscious. JA subsequently developed respiratory depression and anoxic encephalopathy (brain damage due to lack of oxygen) secondary to ethanol intoxication. On admission, JA's blood alcohol concentration (BAC) was determined to have been approximately 0.450%, a nearly fatal level consistent with respiratory depression and brain damage. The question for the jurors to determine was whether or not an intoxicating amount of ethanol had

been served to JA and consequently whether JA had consumed ethanol.

Testimony from patrons at the bar indicated JA had consumed 4-5 beers over 2 hours at the bar. The plaintiffs' expert had appeared visibly intoxicated. The plaintiffs' expert calculated JA's BAC using a combined amount of ethanol consumed. In these calculations, plaintiffs' expert assumed an average of 1 hour, an assumption based on a range of 0.01 to 0.02% per hour, which range from 0.01 to 0.02% per hour. This would tend to yield a higher calculated BAC in favor of the plaintiffs and JA had consumed enough ethanol to cause intoxication, despite the fact that JA was not visibly intoxicated in the bar. The defendant's expert, at the defendant's bar, and calculated JA's BAC using a generally accepted method in the field of a burn-off rate of 0.02% per hour. This is a more representative burn-off rate for ethanol consumption. These calculations have been well below the 0.15% BAC level in the toxicology community as that BAC level would be present in a non-tolerant individual.

After completing direct and cross-examination, the jurors asked if they had any questions. Unbeknownst to the jurors, questions had been obtained by the defense attorneys in JA's BAC. The jurors asked the expert if he had any questions from the serial BACs obtained. The expert and complimented the jury for asking questions. The jurors had failed to ask. The judge asked the expert if the BAC was 0.406% and at 6:30 PM the BAC rate can be calculated by calculating the BAC number by the amount of time. The BAC was 0.406 - 0.301 = 0.105, and the time was 5 hours. This yielded a burn-off rate of 0.02% per hour. The expert had assumed (0.02%) and the defendant's rate plaintiffs' expert had employed. The defense requested validated this expert's assumption. The defense discredited plaintiffs' expert. The jury returned a defense verdict. Jurors' questions were asked to compensate for errors made by the experts or not asking key questions.

Key Terms: Jurors' Questions; Defense

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enjamin, Ph.D.

of Forensic Sciences, Jurisprudence 20, 2004) In the Commonwealth of jurors to question testifying experts erred in direct testimony or cross-the expert's testimony, some Superior e any questions to ask of the forensic write down their questions and submit the lawyers over to a side bar and reys. If one party has an objection to a both parties agree on a question, it is d the expert has an opportunity to re- urors to question experts is proven by this author served as an expert for the l. The case involved a Dram Shop liti- an allegation that a restaurant or bar already exhibiting visible signs of in- is served, and that patron then left the ehicle that was subsequently involved y and/or property damage occurred. If ibly intoxicated at the time the liquor ol, then the bar or restaurant is civilly a intoxicated driver.

-aged male with a long history of alco- , JA was drinking at a local pub. Dur- left the bar with a friend, purchased a to the bar where he met another friend. nd and while driving around, they en- oking for company". JA got out of the urs later, JA was found on the street, edics were summoned to the scene and g of liquor and only semiconscious. JA y depression and anoxic encephalopa- xygen) secondary to ethanol intoxica- ohol concentration (BAC) was deter- 0.450%, a nearly fatal level consistent in damage. The question for the jurors an intoxicating amount of ethanol had

been served to JA and consumed by JA while he was in the bar, or whether JA had consumed ethanol he had purchased, after he left the bar.

Testimony from patrons at the bar indicated that JA had consumed about 4-5 beers over 2 hours at the bar, and no patron was able to testify that JA had appeared visibly intoxicated while in the bar. The expert for the plain- tiffs calculated JA's BAC using a calculation for total body water and the combined amount of ethanol consumed over a 2-hour time. In performing these calculations, plaintiffs' expert used a "burn-off" rate of 0.015% per hour, an assumption based on burn-off rates in the general population which range from 0.01 to 0.025% per hour. A lower burn-off rate would tend to yield a higher calculated BAC thus skewing the resulting calcula- tion in favor of the plaintiffs and bolstering plaintiffs' expert's opinion that JA had consumed enough ethanol in the bar to cause visible signs of in- toxication, despite the fact that no patron testified that JA had appeared visibly intoxicated in the bar. This author testified as an expert for the de- fendant bar, and calculated JA's BAC using the Widmark formula, the generally accepted method in the forensic toxicology community, using a burn-off rate of 0.02% per hour, a value published in the literature as a more representative burn-off rate for individuals accustomed to frequent ethanol consumption. These calculations indicated that JA's BAC would have been well below the 0.15% generally accepted by the forensic toxi- cology community as that BAC at which signs of visible intoxication would be present in a non-tolerant individual.

After completing direct and cross-examination, the court asked jurors if they had any questions. Unbeknown to this expert, serial BAC determina- tions had been obtained by the hospital, in order to monitor the decrease in JA's BAC. The jurors asked if the burn-off rate could be calculated from the serial BACs obtained. The judge posed the question to this ex- pert and complimented the jury on asking an important question the litiga- tors had failed to ask. The judge provided the following data: at 1:30 am, the BAC was 0.406% and at 6:30 am, the BAC was 0.301%. The burn-off rate can be calculated by calculating the change in BAC and dividing that number by the amount of time that transpired. The change in BAC was: $0.406 - 0.301 = 0.105$, and the time interval was 5 hours. 0.105 divided by 5 yielded a burn-off rate of 0.021 % per hour, almost exactly what this expert had assumed (0.02%) and more than 33% higher than the burn-off rate plaintiffs' expert had employed. The calculations the jurors had re- quested validated this expert's assumption with regard to burn-off rate and discredited plaintiff's expert. The jurors found no negligence and returned a defense verdict. Jurors' questions can improve the quality of justice and compensate for errors made by the litigators in withholding data from ex- perts or not asking key questions.

Key Terms: Jurors' Questions; Dram Shop; Burn-Off Rate

In the Dram Shop case described in Figures 2 and 3, Joseph Albert by his Guardian et al. v. Harold F. LeClair Co., D/B/A Gus and Paul's Tavern, the jurors were allowed to ask questions of the experts. One juror asked if the burn off rate could be calculated from two serial blood ethanol determinations drawn at the hospital approximately 5 hours apart. I went up to the "flip chart" and did the calculations suggested by the juror and it showed the burn off rate to be 0.021%/hr. I had used 0.02% in my calculations and the opposing expert had used 0.015%. Thus the answer to the juror's question provided support for the burn-off rate I used in my calculations and the jurors returned a verdict for the defendants, the party that had retained me. Moreover, this scenario was so compelling, that the judge complimented the jurors for asking a question the lawyers had not asked, and I wrote up the results and presented the case at the American Academy of Forensic Sciences (see Figure 3).

The information presented in the following pages will permit you to learn how to calculate the amount of ethanol in an alcoholic beverage, how to determine an appropriate time for the ethanol to be absorbed based on the amount of food in the stomach, and how to calculate an individual's BAC from the individual's height, weight, and amount of ethanol consumed over time. The ratio of height to weight provides information on lean body mass so the Widmark "r" factor (or distribution factor) can be selected. Included tables will provide guidance on the continuum of impairment that ensues after ingestion of ethanol, and how to determine the likelihood of visible intoxication at various BACs.

II. BASIC PHARMACOLOGY OF ETHANOL

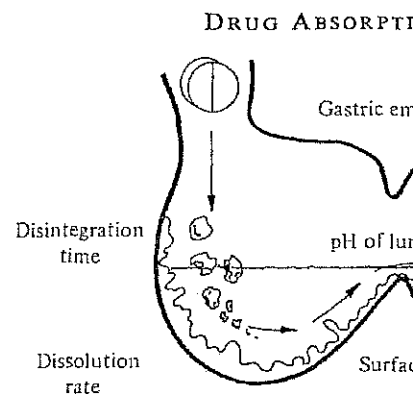
Ethyl alcohol (ethanol, ETOH) or just alcohol has been described as the "perfect" drug. It is a small uncharged molecule, completely miscible (soluble) in water, the major constituent of all bodily fluids and tissues, and not subject to changes in molecular structure as a result of changes in the acidity (pH) of the stomach and intestinal fluids. Because ethanol is an uncharged molecule, it passes easily through the lipid membrane barriers of the body (e.g., from the stomach into the bloodstream or from the intestines into the bloodstream).

Approximately 25% of ingested ethanol is absorbed through the stomach wall, and the remainder is absorbed from the small intestines. Therefore, the faster ethanol leaves the stomach and enters the intestines, the more rapid the accumulation of ethanol in the blood. This is why the presence of food in the stomach decreases the rate of absorption of ethanol, because food delays "gastric emptying time." Medications that slow gastric emptying time also delay ethanol absorption, while medications that increase gastric emptying time increase the rate of absorption.

Because ethanol is not soluble in fat, it does not accumulate in the fatty tissues of the body. For example, consider a bottle of oil out of the refrigerator and set it on a surface of water, it floats on top of the water rather than on the bottom. If you were to pour a drop of oil on a dressing, the ethanol would go to the oil phase. The same analogy holds for ethanol in the body. Ethanol goes to the parts of the body that are fatty, such as the lungs, the muscles and the blood, and does not cumulate very little ethanol.

The movement of ethanol or any other drug is determined by the drug's pharmacokinetics. Pharmacokinetics is divided into three parts: **absorption, distribution, metabolism**. Absorption has been absorbed into the blood, distribution is subject to metabolism and excretion. These three processes occur contemporaneously and concurrently. Absorption, distribution, metabolism and excretion.

A schematic model of the absorption of a drug in the intestinal tract is shown in Figure 4. The drug must first dissolve before they can be absorbed, then absorbed.



Figures 2 and 3, Joseph Albert by his co., D/B/A Gus and Paul's Tavern, the judge experts. One juror asked if the burn off of blood ethanol determinations drawn at court. I went up to the "flip chart" and did the calculations and the opposing expert had the juror's question provided support for the case and the jurors returned a verdict for the defendant. Moreover, this scenario was so convincing that the jurors for asking a question the lawyers asked and presented the case at the American Bar Association (Figure 3).

Following pages will permit you to learn how to determine an individual's BAC from the individual's blood consumed over time. The ratio of height to body mass so the Widmark "r" factor (or included tables will provide guidance on the rate of absorption after ingestion of ethanol, and how to calculate the rate of elimination at various BACs.

PHARMACOLOGY OF ETHANOL

Ethanol has been described as the "perfect" molecule, completely miscible (soluble) in all body fluids and tissues, and not subject to changes in the acidity (pH) of the body. Because ethanol is an uncharged molecule, it passes through the barriers of the body (e.g., from the stomach and the intestines into the bloodstream).

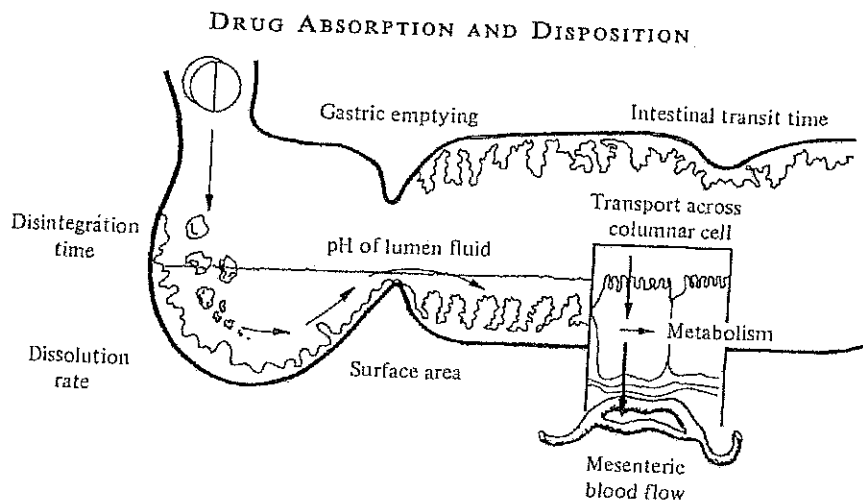
Ethanol is absorbed through the stomach wall, the small intestines. Therefore, the faster the transit through the intestines, the more rapid the accumulation of ethanol, because food delays "gastric emptying" time also delay ethanol absorption. As gastric emptying time increase the rate

Because ethanol is not soluble in fat, it only goes into the water soluble portions of the body. For example, consider a bottle of Italian dressing. When you take it out of the refrigerator and set it on the table, because the oil is less dense than water, it floats on top of the water phase, while the water and vinegar portion are on the bottom. If you were to pour ethanol into this hypothetical bottle of Italian dressing, the ethanol would go to the water phase with the vinegar, not the oil phase. The same analogy holds for the human body. When ethanol is ingested, it goes to the parts of the body that contain the most water. This includes the organs, the muscles and the blood, primarily. Fat, bone, and connective tissue accumulate very little ethanol.

The movement of ethanol or any other drug into and out of the body is described by the drug's pharmacokinetics. "Pharmacokinetics" for drugs, and "kinetics" for movement. Pharmacokinetics is divided into four contemporaneous phases: **absorption, distribution, metabolism and excretion**. As soon as some ethanol has been absorbed into the blood, it is distributed throughout the body and subject to metabolism and excretion. The four phases of ethanol pharmacokinetics occur contemporaneously and continuously until all the ethanol has been absorbed, distributed, metabolized and excreted from the body.

A schematic model of the absorption of drugs and ethanol from the gastrointestinal tract is shown in Figure 4. Note that pills have to disintegrate and dissolve before they can be absorbed, but ethanol is a liquid and gets rapidly absorbed.

Figure 4



III. ABSORPTION

The rate of absorption of ethanol and its subsequent appearance in the blood is dependent on the following factors:

1. The rate of consumption: (chugging vs. sipping)
2. The concentration or proof of ethanol in the beverage: (e.g., beer = ~4.2%-5.5%), wine = ~12%, and whiskey = Vodkas (40% or 50%), whiskeys (43%), schnapps (variable percentages, look at the bottle).
3. The volume consumed, e.g., a 1.25-1.5 oz. shot vs. a 12 oz. beer vs. 4 oz. of wine.
4. The presence or absence of carbonation, i.e., the ethanol from champagne or sparkling wine is absorbed more quickly than uncarbonated white wine, and the ethanol from scotch and soda would be absorbed more quickly than the ethanol from scotch and water.
5. The presence or absence of food in this the stomach. The presence of food in the stomach delays the absorption of ethanol by increasing the amount of time it takes for the ethanol to move from the stomach to the small intestines, where ethanol is absorbed at its fastest rate. This phenomenon is known as gastric emptying time, and can also be influenced by drugs that affect gastrointestinal (GI) motility.

As a rule of thumb, an individual, drinking a 12 ounce beer on an empty stomach, over 15-20 minutes, will achieve a peak blood ethanol concentration approximately 30 minutes after starting the beer. With food in the stomach, the same person drinking the same 12 ounce beer with a full stomach over the same 15-20 minutes will achieve a peak blood ethanol concentration approximately 60-90 minutes after starting the beer, but the peak concentration will be much lower. This is because not only does food absorb some of the ethanol, food also slows down the gastrointestinal transit (movement) of the ethanol from the stomach to the small intestines.

IV. DISTRIBUTION

Once the ethanol has been absorbed from the stomach and/or the intestines into the blood, it is circulated or distributed to all water-containing portions of the body to which there is blood flow. When citizens are taken to the police station for breathalyzer testing, the CMR (501 CMR 2.55) require law enforcement to wait at least 15 minutes before initiating breathalyzer testing. This accomplishes

two things: 1) It minimizes the alcohol present from the recent use of tobacco, medications, mouthwash, etc. a citizen may have used during the test. 2) It increases the likelihood that the subject is in a steady state in the intestinal tract, which is known to produce the differences between

V. METABOLISM

Most ethanol metabolism occurs in the liver. Alcohol dehydrogenase. However, Alcohol Dehydrogenase is also found in the stomach and intestines which cause the absorption process. In addition to body fat content, another reason for the difference in alcohol concentration (BAC) than men is because women have a lower amount of alcohol in the stomach and intestinal walls.

In the liver, ethanol is metabolized to acetaldehyde, and acetaldehyde is then metabolized to acetic acid, which re-enters the blood stream for urinary excretion.

The burn-off rate for ethanol in the blood is 0.010% per hour to 0.025% per hour. Those individuals who are frequent drinkers have higher rates than infrequent drinkers. The burn-off rate is 0.025% per hour, due to the induction of the P-450 enzyme 2E1 or CYP2E1 in the liver, but are a different class of enzyme.

VI. EXCRETION

The "burn-off rate" is a hybrid of metabolism and excretion. The burn-off rate has to do with metabolism. An individual's burn-off rate does not have anything to do with the individual's race. The major differences in the abilities of metabolism are between Asian people and American Indians, Caucasians, so they may demonstrate impaired or intoxicated after consumption.

its subsequent appearance in the blood is

1g vs. sipping)

anol in the beverage: (e.g., beer = ~4.2%-key = Vodkas (40% or 50%), whiskeys ages, look at the bottle).

5-1.5 oz. shot vs. a 12 oz. beer vs. 4 oz. of

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rom the stomach and/or the intestines into ed to all water-containing portions of the hen citizens are taken to the police station. 11 CMR 2.55) require law enforcement to ng breathalyzer testing. This accomplishes

two things: 1) It minimizes the likelihood that there will be any residual mouth alcohol present from the recent use of breath sprays, asthma inhalers, smokeless tobacco, medications, mouthwash, or any other alcohol-containing material the citizen may have used during the prior 15 minute interval, and 2) It minimizes the likelihood that the subject is still absorbing ethanol from his/her gastrointes- tinal tract, which is known to produce a falsely elevated breathalyzer test be- cause of the differences between venous and arterial blood ethanol concentrations.

V. METABOLISM

Most ethanol metabolism occurs in the liver, by the enzyme Alcohol Dehydro- genase. However, Alcohol Dehydrogenase is also present in the walls of the stomach and intestines which causes some ethanol to be metabolized during the absorption process. In addition to their lower average body weights and higher body fat content, another reason why women tend to achieve a higher blood alcohol concentration (BAC) than men from comparable amounts of ethanol is because women have a lower amount of Alcohol Dehydrogenase in their stom- ach and intestinal walls.

In the liver, ethanol is metabolized by the enzyme Alcohol Dehydrogenase to acetaldehyde, and acetaldehyde is metabolized by Aldehyde Dehydrogenase to acetic acid, which re-enters the blood and is distributed to the kidneys for uri- nary excretion.

The burn-off rate for ethanol in occasional drinkers ranges from approximately 0.010% per hour to 0.025% per hour, with an average of 0.017% per hour. Those individuals who are frequent drinkers have higher burn-off (metabolic) rates than infrequent drinkers. Frequent drinkers average closer to 0.02%-0.025% per hour, due to the induction of another enzyme called the Cytochrome P-450 enzyme 2E1 or CYP2E1 enzyme. The CYP enzymes also are found in the liver, but are a different class of enzymes than Alcohol Dehydrogenase.

VI. EXCRETION

The "burn-off rate" is a hybrid constant encompassing both metabolism and excretion. The burn-off rate has the same numeric ranges shown above under metabolism. An individual's burn-off rate is based on his/her genetics, and does not have anything to do with the individual's body weight or height. There are major differences in the abilities of various individuals to metabolize ethanol. Asian people and American Indians typically have slower burn off rates than Caucasians, so they may demonstrate a reduced tolerance to ethanol and become impaired or intoxicated after consuming relatively small amounts of ethanol.

A small fraction of ethanol is also excreted in tears, sweat, breast milk, and expired air. For the breath, the ratio of the amount of ethanol in 1ml of blood to that in expired air is often cited as 1:2100. This is based on Henry's Law, which states that at 34°C, the amount of ethanol contained in 1ml of blood will be equal to the amount of ethanol contained in 2100 ml of deep lung air. This deep lung air is also called alveolar air, and is the air in the deep portions of the lung that are in equilibrium with the blood, which is on the other side of the capillary membrane that lines the deep alveoli in the lungs.

VII. GENERAL OVERVIEW OF ETHANOL PHARMACOKINETICS

As a person begins to drink ethanol, the blood levels begin to rise rapidly because the rate of absorption is greater than the rate of excretion (see Figure 5). When 50% of the ethanol has been absorbed from the GI tract, the absorption phase ends as ethanol blood levels reach a maximum concentration. This maximum concentration is depicted graphically as either a peak or plateau (see Figure 5). As metabolism continues, the rate of metabolism exceeds the rate of absorption, and the blood alcohol concentration begins to decline.

Figure 5

Graph of BAC vs. Time

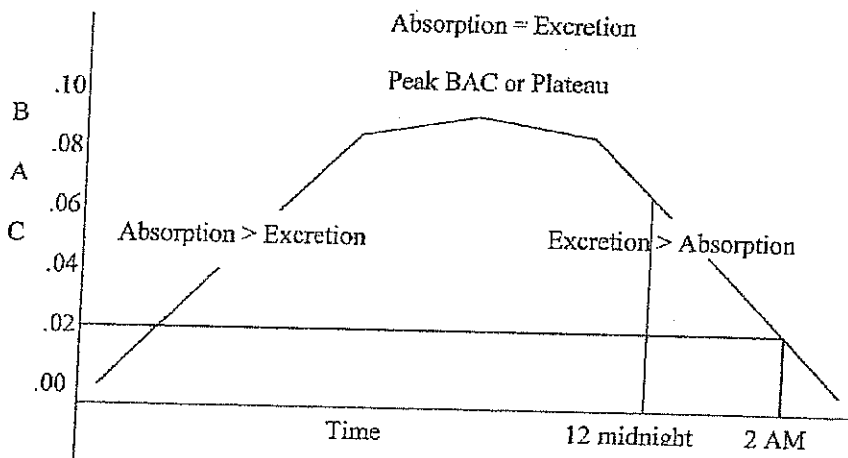


Figure 5 depicts the pharmacokinetics of several drinks with the BAC shown on the vertical axis and time on the horizontal axis. Following the peak BAC, the BAC enters the post-absorptive or elimination phase when the rate of excretion

is greater than the rate of absorption. The change in BAC (Δ), divided by the time interval, gives a line with a slope that decreases as the BAC declines. The slope of this curve now represents the rate of elimination, which remains fairly constant for any individual, even if drinking habits change. At BAC 0.08, the rate may change due to concentration, burn-off rates vary significantly (subject variability).

VIII. CALCULATING BAC IN A BEVERAGE

A 12 oz. can of Budweiser Light beer contains 0.042% ethanol. Twelve oz. of beer x 0.042% = 0.0504% ethanol per can or glass.

Scotch or rye whiskey is 86 proof, which is either "neat" or mixed, contains 44% ethanol. A 1.5 oz. shot of 80 proof vodka contains 0.40=0.60 fluid ounces of pure ethanol.

Wine usually contains 12% ethanol. A 5 oz. glass of wine contains 4 fluid ounces. So, 4 oz. x 12% = 0.48 fluid ounces of pure ethanol. Port and other fortified wines contain higher ethanol concentrations which can be 20%.

As you can see, a 12 oz. can of beer, a 5 oz. glass of wine, and a 1.5 oz. shot of whiskey all contain approximately 0.05% ethanol.

Calculating an Individual's BAC and the Amount of Ethanol in a Beverage

In order to calculate an individual's BAC, one must assume a weight. Assuming, one can use the Widmark formula, which is used by the Forensic Toxicology community.

reted in tears, sweat, breast milk, and ex-
he amount of ethanol in 1ml of blood to
.00. This is based on Henry's Law, which
anol contained in 1ml of blood will be
ed in 2100 ml of deep lung air. This deep
is the air in the deep portions of the lung
which is on the other side of the capillary
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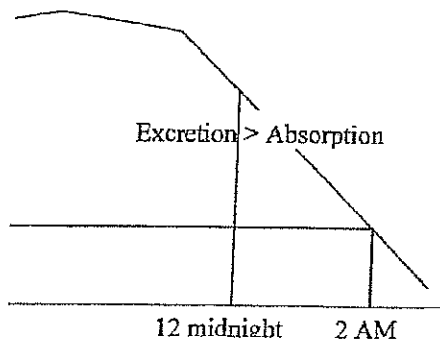
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ration begins to decline.

ure 5

of BAC vs. Time

orption = Excretion

BAC or Plateau



of several drinks with the BAC shown on
ontal axis. Following the peak BAC, the
ination phase when the rate of excretion

is greater than the rate of absorption. At this time, the slope of the curve (the change in BAC (Δ), divided by the change in time) is represented by a straight line with a slope that decreases from a upper left to lower right. The numeric slope of this curve now represents the elimination or burn-off rate. This rate remains fairly constant for any one person (little intra-subject variability) unless drinking habits change. At BACs below 0.01% or above 0.30%, the elimination rate may change due to concentration effects. However, in the general population, burn-off rates vary significantly among different individuals (great inter-subject variability).

VIII. CALCULATING THE AMOUNT OF ETHANOL IN A BEVERAGE

Let's start with a beer.

A 12 oz. can of Budweiser Light contains 4.2% ethanol volume to volume. Twelve oz. of beer \times 0.042% = 0.50 fluid ounces of pure ethanol in the 12 oz. can or glass.

One Shot of whiskey:

Scotch or rye whiskey is 86 proof or 43% ethanol. A 1.25 oz. shot of whiskey, either "neat" or mixed, contains a total of $1.25 \times 0.43 = 0.54$ fluid ounces of pure ethanol. A 1.5 oz. shot of 80 proof whiskey (40%) contains a total of $1.5 \times 0.40 = 0.60$ fluid ounces of pure ethanol.

One glass of wine:

Wine usually contains 12% ethanol volume to volume. A glass of wine usually contains 4 fluid ounces. So, $4 \text{ oz.} \times .12 = 0.48$ fluid ounces of ethanol in a 4 oz. glass of wine. Port and other fortified wines and "specialty drinks" contain higher ethanol concentrations which usually are printed on the labels of the bottles.

As you can see, a 12 oz. can of beer, a 4 oz. glass of wine, and a 1.25 oz. shot of whiskey all contain approximately the same amount of ethanol, one half ounce.

Calculating an Individual's BAC from his/her Height, Weight and the Amount of Ethanol Consumed

In order to calculate an individual's BAC from the amount of ethanol they consumed, one can use the Widmark Formula, the Generally Accepted method in the Forensic Toxicology community.

The Widmark Formula

(SpGr Blood) (grams of ETOH) (SpGr ETOH) - Total Widmark Ξ

BAC = (Body Weight in kg.) (Widmark r) (amt. of ETOH burnt off)

Problem: A 170 lb. man consumes a 12 oz. Budweiser Light on an empty stomach in 15 minutes. What is his BAC 30 minutes later?

Constants: The SpGr (specific gravity) of Blood = 1.06; the SpGr of ethanol = 0.79; A fluid ounce of water contains approximately 30 ml and weighs 30 grams. One kg.=2.2 lbs. Widmark r = 0.68 for men and 0.55 for women (who are not overweight).

- Substituting into the Widmark equation:

$$\text{BAC} = \frac{(1.06) (0.5 \text{ oz of ETOH in a beer} \times 30) (0.79)}{(170 \text{ lbs.} / 2.2 = 77.3 \text{ kg}) (\text{Widmark r for non-fat males} = 0.68)} - 0.02\% \text{ per hr} \times 0.5 \text{ hr}$$

$$(170 \text{ lbs.} / 2.2 = 77.3 \text{ kg}) (\text{Widmark r for non-fat males} = 0.68)$$

$$\text{BAC} = \frac{(1.06) (15 \text{ grams}) (0.79)}{(77.3 \text{ kg}) (0.68)} - 0.01$$

$$\text{BAC} = \frac{12.561 \text{ grams}}{52.564 \text{ kg}} - 0.01 = \frac{0.24 \text{ grams}}{\text{kg}} - 0.01$$

But, percent (%) has the units grams/100ml, and a kg of water contains 1,000 ml, so we divide top and bottom by 10 by moving the decimal place one place to the left. So, 0.024 grams/100 ml less what was burnt-off in 30 minutes (0.01) and the BAC becomes $0.024 - 0.010 = 0.014\%$.

This formula is very useful for answering hypothetical questions regarding an individual's BAC following the ingestion of a certain number of alcoholic drinks. All the toxicologist has to do is develop a chronology from the depositions, bar receipts, and testimony of the fact witnesses as to how many of what type of drinks were ingested by the individual in question, calculate the amount of ethanol in each drink, select an absorption rate based on how much food the subject had consumed, determine the subject's height and weight so that the appropriate Widmark distribution factor (r) can be selected (average for men is 0.68, and the average for a woman is 0.55 because women have a higher percent of fat in their bodies), and then select an appropriate burn-off rate (Ξ), based on the individual's drinking habits (for light drinkers use the Widmark average of 0.017, for frequent drinkers use a faster burn-off rate of at least 0.02).

General Rule of Thumb

A good general rule of thumb for each drink will produce a BAC of approximately also 0.02% per as 20 mg/dl/hr. That is where the an hour without getting more in empty stomach, each drink will p and the burn-off rate will still be a

Problem

A 170 lb. man goes into a bar and estimated to be when he leaves the BAC of 0.02%. That means that would have been 0.12%. But he b $\times 0.02 = 0.08$, so his BAC when h 0.04% ($0.12 - 0.08$).

IX. BACK EXTRAPOLATION

When ethanol is ingested, initially gets into the blood, distribution, absorption is greater than excretion rising. When absorption is equal when excretion is greater than absorption descends at a rate equal to the increase can only be carried out when the growth cause only at that time is the relationship (straight line). Moreover, the control SJC-08268 (2001) also recognizes every burn-off rate selected so the applied that reflect the variability in the Daubert criterion of "potential error effect (and a lower limit as well). If an hour has been used, the variability burn-off rate would be 0.015% and Using an upper and lower limit may and best case scenarios.

Widmark Formula

$\text{pGr ETOH} = \text{Total Widmark } \Sigma$

mark r) (amt. of ETOH burnt off)

12 oz. Budweiser Light on an empty stom-
0 minutes later?

) of Blood = ~ 1.06 ; the SpGr of ethanol =
ns approximately 30 ml and weighs 30
: 0.68 for men and 0.55 for women (who

1:

per x 30) (0.79) - 0.02% per hr
ark r for non-fat males=0.68) x 0.5 hr

r non-fat males=0.68)

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100ml, and a kg of water contains 1,000
by moving the decimal place one place to
what was burnt-off in 30 minutes (0.01)
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subject's height and weight so that the
or (r) can be selected (average for men is
.55 because women have a higher percent
an appropriate burn-off rate (Σ), based on
ght drinkers use the Widmark average of
burn-off rate of at least 0.02).

General Rule of Thumb

A good general rule of thumb for men 150-200 lbs is that on an empty stomach, each drink will produce a BAC of no more than 0.02% and that the burn-off rate is approximately also 0.02% per hour. Scientists also describe the burn-off rate as 20 mg/dl/hr. That is where the old adage about being able to drink one drink an hour without getting more intoxicated. For a woman 110-130 lbs, on an empty stomach, each drink will produce a BAC of no more than 0.025-0.03% and the burn-off rate will still be approximately 0.02% per hour (or a little less).

Problem

A 170 lb. man goes into a bar and consumes 6 beers in 4 hours. What is his BAC estimated to be when he leaves the bar? He consumed 6 beers, each producing a BAC of 0.02%. That means that if no metabolism took place at all, his BAC would have been 0.12%. But he burnt off approximately 4 beers in 4 hours, or $4 \times 0.02 = 0.08$, so his BAC when he left the bar would have been approximately 0.04% (0.12 - 0.08).

IX. BACK EXTRAPOLATION OR RETROGRADE EXTRAPOLATION

When ethanol is ingested, initially only absorption occurs. Once some ethanol gets into the blood, distribution, metabolism and excretion also occur. When absorption is greater than excretion, the line on the BAC vs. Time graph will be rising. When absorption is equal to excretion, a plateau or peak occurs. And when excretion is greater than absorption, the line on the BAC vs. Time graph descends at a rate equal to the individual's burn-off rate. Back extrapolations can only be carried out when the graph is descending (see Figure 5). This is because only at that time is the relationship between BAC and time linear (i.e., a straight line). Moreover, the controlling case in Massachusetts, *Com v. Senior* SJC-08268 (2001) also recognizes that there is some variability associated with every burn-off rate selected so the case law asks that upper and lower limits be applied that reflect the variability in the calculations. This is consistent with the *Daubert* criterion of "potential error rate" and *Lanigan's* reference to a ceiling effect (and a lower limit as well). For example, if a burn-off rate of 0.02% per hour has been used, the variability is approximately ± 0.005 , so the lowest burn-off rate would be 0.015% and the highest burn off rate would be 0.025%. Using an upper and lower limit may be considered indications of the worst-case and best case scenarios.

Example:

A man orders his last drink at 11:15 pm and leaves a bar at midnight. He gets into an automobile accident at 1 am. At the hospital, his blood is drawn at 2 am and his BAC is determined to be 0.12%. What were his BACs at 1 am, at midnight, and at 11:15 pm when he ordered his last drink?

Hint: See the post-absorptive part of Figure 5.

Using The Mean Value:

Assume a mean burn-off rate of 0.02%/hr. Then if the BAC were 0.12% at 2 am, at 1 am it would have been 0.14% and at midnight it would have been 0.16%.

Best Case Scenario (i.e., the lowest possible BAC):

Assume a slow burnoff rate of 0.015/hr. Then if the BAC were 0.12% at 2 am, it would have been 0.015% higher or 0.135% at 1 am and it would have been 0.03% higher or 0.15% at midnight.

Worst Case Scenario (i.e., the highest possible BAC):

Assume a fast burnoff rate of 0.025/hr. Then if the BAC were 0.12% at 2 am, at 1 am it would have been 0.145% and at midnight it would have been 0.170%.

But what about at 11:15 pm when he ordered his last drink? It cannot be calculated using back-extrapolation because the BAC would have been rising between 11:15 pm and 11:45 pm. Therefore a value at 12 midnight, or possibly 11:45 pm, is as close to 11:15 pm as science will allow you to calculate using back-extrapolation.

X. ACTUAL VALUE FOR THE BURNOFF RATE

The only way to determine an individual's actual burn-off rate is to calculate it experimentally from two blood samples obtained at least 60 minutes apart (preferably longer). In the post-absorptive phase, the drop in BAC in one hour is equal to the burn off rate.

As I explained in the *Albert v. Gus and Paul*'s case in Figure 3, pursuant to the juror's question, the judge provided the following data: at 1:30 am, the BAC was 0.406% and at 6:30 am, the BAC was 0.301%. The burn-off rate can be calculated by calculating the change in BAC and dividing that number by the amount of time that transpired. The change in BAC was: $0.406 - 0.301 = 0.105$, and the time interval was 5 hours. 0.105 divided by 5 yielded a burn-off rate of 0.021% per hour.

XI. CONVERTING BLOOD PLASMA LEVEL TO PERCENT ETHANOL CONCENTRATION

In the hospital, a blood sample free of red blood cells is used to separate the red blood cells from the plasma. The difference between serum and plasma is the difference between serum and plasma terminations. In the absence of red blood cells, the results are reported as plasma ethanol. When results are reported as plasma ethanol, due to the differences in the effect of the red blood cells on the ethanol result by approximately 10% level. This can be accomplished by multiplying the serum ethanol by 0.9. For example, a serum ethanol of 0.10% is equivalent to a plasma ethanol of 0.09%. Pursuant to statute, you can then truncate the result to two decimal places. 501 CMR 2.56 (2) citing M.G.L.c. 94C.

The Office of Alcohol Testing (OAT) uses this chart uses ranges of serum ethanol to obtain a more valid result by doing the conversion to do so.

XII. CONVERTING MILLIGRAMS PER 100 ML TO PERCENT

Some hospital laboratories report ethanol concentration in milligrams per 100 ml, which is the same thing since there are 100 ml in a liter. To convert a BAC reported in milligrams per 100 ml to percent, move the decimal point 3 places to the left. For example, 80 MG/DL is the same as 0.08%. Similarly, 100 MG/DL is the same as 0.10%. Since there are 1,000 ml in a liter, 100 mg is the same as 0.10 ml, and moving the decimal place 3 places to the left. Sometimes, a hospital will report ethanol concentration in milligrams to a gram, 1/10 of a gram.

XIII. CORRELATING BAC WITH BEHAVIOR

When we are sober, we operate "with a clear conscience and inhibitions to stop us from doing things we begin to feel the effects of ethanol. As the self-control is diminished and we start drinking, talking, spilling drinks, boisterous

XI. CONVERTING BLOOD SERUM OR BLOOD PLASMA LEVELS TO WHOLE BLOOD ETHANOL CONCENTRATIONS

In the hospital, a blood sample frequently will be "spun down" in a centrifuge to separate the red blood cells from the clear fluid called serum or plasma. The difference between serum and plasma is not material with respect to BAC determinations. In the absence of red blood cells, the test for ethanol is easier to conduct. When results are reported as serum ethanol (more common than plasma), due to the differences in water content between serum and whole blood and the effect of the red blood cells themselves, one has to lower the serum ethanol result by approximately 15% to convert that result to a whole blood level. This can be accomplished by multiplying the serum ethanol result by 0.85. For example, a serum ethanol of 0.100% is equivalent to a BAC of 0.085%. Pursuant to statute, you can then truncate the last number and call it a 0.08% (see 501 CMR 2.56 (2) citing M.G.L.c. 90 Section 24.

The Office of Alcohol Testing (OAT) publishes a serum conversion chart, but this chart uses ranges of serum ethanol, not single numbers. Therefore, you can obtain a more valid result by doing the conversion yourself or asking your expert to do so.

XII. CONVERTING MG/DL (AND OTHER UNITS) TO PERCENT

Some hospital laboratories report their BAC results in MG/DL or mg/100 ml, which is the same thing since there are 100 ml to a deciliter (DL), which is 1/10 of a liter. To convert a BAC reported in MG/DL to percent, just move the decimal point 3 places to the left. For example, 100 MG/DL is the same as 0.100% and 80 MG/DL is the same as 0.08%. Mass. General Hospital usually reports its serum ethanol results in MG/L, using a three figure value such as 800 MG/L. Since there are 1,000 ml in a liter, 800 MG/L is the same as 80 MG/DL (or 100 ml), and moving the decimal place 4 places to the left gives a value of 0.08%. Sometimes, a hospital will report a BAC as 0.100 g/100 ml. Since there are 1,000 mg to a gram, 1/10 of a gram is 100 mg, so 0.1 g = 100 mg.

XIII. CORRELATING BAC WITH IMPAIRMENT

When we are sober, we operate "with the brakes on." That is to say, we have our conscience and inhibitions to stop us from doing impulsive or illegal acts. When we begin to feel the effects of ethanol, we lose some of our inhibitions and our self-control is diminished and we begin to act "without the brakes on." Loud talking, spilling drinks, boisterous actions, bumping into other people all occur

1 and leaves a bar at midnight. He gets the hospital, his blood is drawn at 2 am . What were his BACs at 1 am, at mid- his last drink?

are 5.

ir. Then if the BAC were 0.12% at 2 am, midnight it would have been 0.16%.

sible BAC):

Then if the BAC were 0.12% at 2 am, it 135% at 1 am and it would have been

ossible BAC):

Then if the BAC were 0.12% at 2 am, at midnight it would have been 0.170%.

ordered his last drink? It cannot be calcu- the BAC would have been rising before a value at 12 midnight, or possibly cience will allow you to calculate using

IV. THE BURN-OFF RATE

al's actual burn-off rate is to calculate it : obtained at least 60 minutes apart (pref- phase, the drop in BAC in one hour is

1 Paul's case in Figure 3, pursuant to the re following data: at 1:30 am, the BAC was 0.301%. The burn-off rate can be 1 BAC and dividing that number by the nge in BAC was: $0.406 - 0.301 = 0.105$, 5 divided by 5 yielded a burn-off rate of

because we are in less control of ourselves and our judgment and coordination are impaired.

It is important to recognize that the effects of ethanol are manifested in a graded manner, like a "dimmer switch" rather than an on/off switch. The first area of the body affected by ethanol is the brain's intellectual or cognitive functions. Therefore you "feel impaired" before you "appear impaired." In non-tolerant individuals, generally this will occur at BACs between 0.05%-0.10%. Impairment then begins to affect fine motor coordination. For example, at BACs consistent with impairment, ethanol affects the ability to put a key in the ignition before it causes you to stagger or fall. At higher BACs (0.10%-0.20%), speaking becomes slurred because you can't coordinate the muscles of the tongue and mouth. As impairment increases, the larger muscles of the arms and legs are affected and incoordination, staggering, impaired balance, and falling or tripping may occur. Finally, a severely intoxicated individual (BAC 0.20%-0.30%) will lack the strength to stand, will remain motionless, and perhaps fall asleep. When BACs exceed 0.30%, speaking, walking, talking, standing and moving become laborious. Should the BAC approach 0.40% most individuals are in danger of passing out, and when the BAC exceeds 0.45%, there is a real risk of death from the depression of respiration and circulatory collapse. These descriptions are a general guideline only and certainly do not describe everyone's response to alcohol all of the time.

However, tolerance to the effects of ethanol and the ability to develop "coping skills" to mask the signs of impairment do develop in frequent high dose imbibers of ethanol. People have been found to have BACs of 1.0% or higher (see Lancet Dec. 18, 1982 p.1394) which is classically described as fatal. Thus the onset and appearance of intoxication are quite variable among individuals and are dependent not only on the rate and amount of alcohol consumed, but also on tolerance, learned coping behaviors, the setting in which it is used, and the expectations of the person. The same amount of ethanol causes a person to laugh hysterically at a wedding, and cry mournfully at a funeral.

Demonstrating impairment is important in obtaining a conviction in a criminal OUI case, but the standard in a Dram Shop case and other types of civil liquor liability is "signs of visible intoxication." Impairment may not be visible to an external observer, but intoxication may be. According to Webster's Dictionary, intoxication involves a person who is stupefied to the point where physical and mental control are markedly diminished. Therefore, people get into fights, drive in the wrong direction on the highway, misjudge their speed or ability to negotiate a curve, and manifest difficulties with vision, hearing, speaking and performing several tasks at the same time (e.g., divided attention tasks). That is why law enforcement uses Standardized Field Sobriety Tests (sFST) which require you to do several things at one time (e.g., divided attention) to assess impairment.

XIV. SUMMARY

There is no substitute for the com-
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XIV. SUMMARY

There is no substitute for the combination of a well-qualified expert and a experienced attorney working together to present the facts of the case to a jury. Do not rely on one another. Many charlatans try to pass themselves off as experts in forensic toxicology or drug pharmacology, when in fact, they are unable to do the calculations described earlier in this chapter. With all due respect to the medical leagues in the medical field, medical doctors without specialized training in forensic pharmacology or toxicology are among those who may tell you they are experts in ethanol, but when their feet are held to the fire during cross-examination, MDs frequently cannot do the math or convert a serum ethanol level to a blood level.

When you retain an expert in ethanol, call another attorney who does forensic liquor liability work (like those on today's panel) and get a referral from that attorney. If you find a potential expert on your own, ask the expert to provide references of attorneys with whom he or she has worked in the past. Ask the expert if he/she can convert serum levels to whole blood levels, if they can calculate an individual's BAC from the data in the Widmark formula, and if they are familiar with the standard of care in the forensic toxicology community for analyzing whole blood, serum, and urine ethanol samples, and if they are familiar with the difference between a "screening" test and a "confirmatory" test. Ask your potential expert if they are familiar with the limitations of back-extrapolation. If your potential expert cannot answer in the affirmative and the opposing expert can, then you are walking on thin ice, and your client's chance of prevailing will be greatly diminished.



UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS)
 SHE IS THE ADMINISTRATRIX OF THE)
 ESTATE OF AWILDA SANTIAGO, ESSEX)
 PROBATE COURT DOCKET #03P-2499AD1,)
 P/P/A VERONICA ROSARIO AND)
 CHRISTINA SANTIAGO, AND AS)
 SHE IS THE ADMINISTRATRIX OF THE)
 ESTATE OF JOSE SANTIAGO, BERLIN)
 (CONNECTICUT))
 PROBATE COURT, CASE #03-0713)
Plaintiff)

Civil Action #05-CV-10617MLW

v.)

RARE HOSPITALITY INTERNATIONAL, INC.)
 d/b/a LONGHORN STEAKHOUSE)
Defendant)

SUPPLEMENT TO DAVID BENJAMIN, PH.D.'S REPORT

This Supplement contains additional opinions to be expressed by me at trial, the data and information considered by me in forming those opinions, and exhibits to be used by me at trial.

A. Calculations and Opinions based on a 4.5 Ounce Jack Daniels Manhattan

On page 6 of my Rule 26 report, previously filed, I wrote about the Longhorn Bar Recipes formula for a Jack Daniels Manhattan straight up, which required a drink containing 2.25 ounces of alcohol be served in a 6 ounce glass, and stated:

"however there seems to be a discrepancy between this recipe and the actual size of the drink when served since the Jack Daniels Manhattan was served in a 6 oz. glass and the above recipe only accounts for 2.25 oz, which means the above calculations may significantly underestimate the ethanol content of the Jack Daniels Manhattan by 2 – 3 fold. Accordingly, my Widmark calculations may significantly underestimate Mr. Southworth's BAC at the time he was served his last drink at 9:35 p.m."

I am expanding on that statement, and have been asked to assume, based on the deposition testimony of Christen O'Donnell, the bartender that made the drinks, that the 6 ounce glass in which the Manhattans were served that evening were filled to $\frac{1}{4}$ inch below the lip. A copy of the relevant portions of her deposition is attached as Exhibit A. Attached hereto as Exhibit B is a Widmark calculation performed by me utilizing all of the same assumptions set forth in the Rule 26 report on pages 5 and 6, except the amount of amounts of bourbon and sweet vermouth in each Jack Daniels Manhattan. Exhibit B assumes the glass was filled to $\frac{1}{4}$ inch below the lip, contained one maraschino cherry and 4.0 oz. of Jack Daniels (80 proof) and .50 oz. of sweet vermouth (32 proof), and thus that each Jack Daniels Manhattan contained 1.68 ounces of ethanol. Based on that assumption, and using all of the other assumptions in the Rule 26 report, and the observations of Southworth made by Jude Connelly, as described in the Rule 26 report and also herein below, I am of the opinion, to a reasonable degree of scientific certainty that Southworth's BAC at 9:25 p.m. was 0.16% and at 9:35 p.m. was ~0.19%, and that he was, at those times, exhibiting visible outward signs of intoxication.

B. Affidavit of May 4, 2005

I also made an affidavit dated May 4, 2005, already filed in this case, pursuant to the provisions of M.G.L. c. 231, §60J. A copy is attached hereto as Exhibit C, and incorporated by reference herein. I set forth in the affidavit my professional qualifications, my review of materials in this case, the relevant events of September 26-27, 2003, the methods I used to arrive at certain opinions, and the opinions themselves. As described in the affidavit, I reached certain opinions, expressed in the affidavit, concerning Mr. Southworth's blood alcohol content at various times on September 26 and 27, 2003, and whether or not he was exhibiting various

outward signs of intoxication at different times that evening. This affidavit, incorporated as part of my rule 26 report by this supplement, contains opinions to be expressed by me at trial, the data and information considered by me and exhibits to be used by me at trial.

C. Reliance on Opinions of Jude Connolly

I want to expand on my reliance upon the observations of Jude Connolly testified to in his State Court deposition and which are also the subject of his affidavit of May 6, 2005.

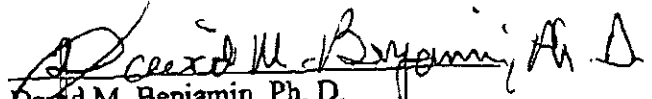
In his deposition, Jude Connolly testified to four different observations he made of Southworth which Connolly characterized in his affidavit as "all the signs of intoxication (he) testified about on pages 49-51 of his deposition." I described those signs in paragraph 21 of my Affidavit.

While at the Longhorn Steakhouse, Southworth appeared to be under the influence of the alcoholic beverages he was drinking. According to Connolly, Southworth "didn't hold himself the way he usually did", "was sloppier looking than usual", "louder than usual" and his "eyes were glassy" (Connolly deposition pp. 49-50).

I have relied upon each of those observations in forming my opinion that Jeffrey Southworth was exhibiting visible signs of intoxication when served his last drink at the Longhorn Steakhouse on September 26, 2003. Each observation described by Jude Connolly is a sign of intoxication well known in my field. As I wrote in paragraph 15 of the opinion section of my affidavit, my opinion, then, and now, and the one I will express at trial, that Southworth was exhibiting visible signs of intoxication was "buttressed by Mr. Connolly's observations". I went on in that paragraph to state, as I am prepared to state and expand upon at trial:

"Once again, Connolly's observations were that Southworth didn't hold himself the same way he usually did, was sloppier than usual, was not standing straight, was louder than usual, and that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy. Not standing straight is caused by the central nervous

system (CNS) depressant effects of ethanol which causes sensory-motor incoordination, which is manifested as weakness, lethargy, and muscle relaxation and, in individuals consuming large quantities of ethanol, are visible signs of alcohol intoxication. Loudness or boisterous behavior is caused by ethanol's ability to decrease inhibitions and diminish an individual's judgment and self-control."


David M. Benjamin, Ph. D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NANCY ROSARIO, INDIVIDUALLY, AS)
SHE IS THE ADMINISTRATRIX OF THE)
ESTATE OF AWILDA SANTIAGO, ESSEX)
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(CONNECTICUT))
PROBATE COURT, CASE #03-0713)

Plaintiff

v.

RARE HOSPITALITY INTERNATIONAL, INC.)
d/b/a LONGHORN STEAKHOUSE)

Defendant

Civil Action #05-CV-10617MLW

AFFIDAVIT OF DAVID M. BENJAMIN, PH.D.

David M. Benjamin hereby makes the following affidavit under the pains and penalties of perjury:

1. The opinions expressed in this affidavit are based on my education, training and experience and review of the documents enumerated below, and are held by me to a reasonable degree of scientific certainty.

My Background and Qualifications

2. I have a B.A. in Biological Sciences from Boston University and a M.S. and Ph.D. in Pharmacology from the University of Vermont College of Medicine. I am a clinical pharmacologist and toxicologist with over twenty-five years experience designing and analyzing research studies involving the effects of drugs on people. I have contributed to the preparation of

numerous Investigational New Drug Files and New Drug Applications which have been approved by the Food and Drug Administration. A brief resume of my background and qualifications together with a list of my publications relating to alcohol is attached as Exhibit A.

3. I have held numerous teaching positions in my career. I am currently Adjunct Assistant Professor in the Dept. of Pharmacology & Experimental Therapeutics at Tufts Medical School, at which I have taught Legal Medicine & Risk Management since 1994, and have been a Faculty Member of the Harvard Medical School Risk Management Program, at which I have taught Legal Medicine & Reducing Medication Errors since 1999. I have also taught courses at the Harvard School of Public Health, George Washington University Law School, Stetson University College of Law and Fordham Law School, and programs for the FBI and the United States Secret Service. The program for the FBI laboratory personnel included information on the pharmacokinetics of ethanol and the mechanism of breathalyzer testing.

4. I have conducted numerous seminars concerning drunk driving and urine and blood drug and alcohol analysis, including the ABA/NHTSA Seminar for Judges: Breathalyzer and Blood Alcohol, Field Sobriety Testing, Urine Drug Screening and Drug Recognition Testing (April 30, 1999); Traffic Adjudication Seminar for Florida Judges: Understanding Breathalyzer Testing & Alcohol Toxicology (1999 to 2004); Massachusetts Academy of Trial Attorneys; Operating Under the Influence Seminar (October 1994); and Massachusetts Continuing Legal Education; OUI (February 13, 1996), Liquor Liability (May 21, 1996 and July 27, 1998); and Understanding the Analysis of Blood and Urine Samples for Drug Abuse (1994/95). I have also taught at Suffolk Law School (Feb. 2004) about the new breathalyzer machine, the Alcotest 7110, currently used in Massachusetts since 2003, and in April 2005 conducted my 7th judicial

seminar on ethanol, breathalyzer testing, urine and blood drug testing for Kentucky District Court Judges.

5. I am a member of numerous associations, and have been elected as a Fellow of the American College of Clinical Pharmacology, where I have served on the Board of Regents (200-2005), Fellow of the American College of Legal Medicine, Fellow, the American Academy of Forensic Sciences (Toxicology Section) (AAFS) and Fellow, the American Society of Healthcare Risk Management. I am also a member of the American Academy of Clinical Toxicology. I am a member the AAFS/Society of Toxicology joint committee on Drugs & Driving. I have also published numerous articles, including a book chapter entitled "Forensic Pharmacology" in Forensic Science Handbook Volume III.

6. In the course of my professional career, I have testified regarding the absorption, distribution, metabolism and excretion of ethanol, and of the effects of alcohol on individuals. I have performed back extrapolations of blood alcohol concentration ("BAC") results. I have testified as an alcohol expert in various courts of law, and have never failed to qualify as an expert in ethanol pharmacology and toxicology in any court in any state. I have been qualified to perform calculations associated with back extrapolations in Massachusetts courts, and the results of my calculations have been admitted as evidence of particular BACs. I have also testified in Federal District Court here in Boston regarding the breathalyzer and ethanol blood levels. I have also published a paper on the conversion of urine ethanol levels to blood levels in the Peer Reviewed Medical Review Officers newsletter.

7. My qualifications regarding determination of BAC by chemical analysis, calculations relating to BAC, back-extrapolation of BAC test results, and the effects of alcohol,

include, among others, a thorough review of the technical literature regarding the effects of alcohol on individuals, methods for the determination of BAC by analysis of body fluids, and methods of calculating BAC, including the principles of alcohol absorption, distribution, metabolism and elimination, and techniques employing the Widmark equation, the generally accepted formula for determining BAC from the amount of ethanol ingested, body weight, height, and burn-off rate as described in a number of my publications and in my lectures to attorneys, judges, forensic scientists, and the FBI laboratory personnel.

My Review of Materials in This Case

8. In connection with services rendered to counsel for the plaintiff in the above action, I have been provided the documents listed below:

Exhibit 1: Complaint filed in Middlesex Superior Court #03-4704L2 in January 2005;

Exhibit 2: Statement of Facts in Support of Summary Judgment filed in the case of Nancy Rosario, et al v. Jeffrey Southworth, et al, Middlesex Superior Court C.A. #03-4704L2.

Exhibit 3: Affidavit of Albert L. Farrah, Jr. dated December 20, 2004 filed in the pending action with the following attached exhibits:

- A. Attached thereto as Exhibit A is the August 19, 2004 deposition of Jude Connelly;
- B. Attached thereto as Exhibit B is the June 22, 2004 deposition of Thomas Scott Espey;
- C. Attached thereto as Exhibit C is the Massachusetts State Police Collision Reconstruction Report dated September 27, 2003;
- D. Attached thereto as Exhibit D is the November 2, 2003 statement of Leigh Chabot.

Exhibit 4: Deposition of Michael J. Espey, dated June 22, 2004

Exhibit 5: A copy September 26, 2003 bill for the group believed to include Jeffrey Southworth and RARE Hospitality International, Inc., d/b/a Longhorn Steakhouse audit report of that date, reflecting food and beverages believed served to the Southworth group

Relevant Events of September 26-27, 2003

9. From my review of these materials, I have relied upon the following relevant background facts, on which I base my opinions.

10. On September 27, 2003 at approximately ten minutes past midnight, a vehicle driven by Jeffrey Southworth on Route 495 in Westford, Massachusetts crashed into the rear of a vehicle driven by Jose Santiago in which his three daughters, Awilda Santiago, Christina Santiago and Veronica Rosario were passengers. Jose and Awilda died. Christina and Veronica were seriously injured in the crash.

11. On the date of the accident, Mr. Southworth was 23 years old, six feet four inches tall and weighed approximately 210 pounds.

12. On September 26, 2003, at approximately 8:00 p.m., Southworth, accompanied by Jude Connelly and Thomas Espey, entered the Longhorn Steakhouse in Leominster, MA. Southworth had consumed at least one twelve-ounce beer approximately thirty minutes before his 8:00 p.m. arrival at the Longhorn Steakhouse.

13. Southworth and Thomas Espey had met that day at an apartment complex in Littleton, Massachusetts near Rt. 495. Thomas Espey left his motor vehicle in that parking lot and had proceeded in Southworth's Dodge Dakota truck to a dirt biking site in Templeton, MA, where they met Connelly.

14. The three finished dirt biking at dusk. At that time, Southworth consumed a 12

ounce beer at the dirt biking site.

15. At approximately 7:30 p.m. to 8:00 p.m., Southworth, Thomas Espey and Connelly left the dirt biking site. They proceeded in the Dodge Dakota truck to the Longhorn Steakhouse in Leominster, MA. The trip took about 25 minutes. Espey drove, Southworth sat in the front and Connelly sat in the back with Southworth's two rottweiler dogs.

16. The group first went to the Longhorn Steakhouse bar and waited to be seated at a table for dinner. According to Connelly, who sat beside him, at the bar, Southworth consumed at least two (2) twenty-four (24) ounce beers, prior to being seated.

17. Southworth, Connelly and Espey were joined by three or four others for dinner, including Espey's brother, Michael Espey. This group was seated at approximately 8:35 p. m.

18. During the meal, Southworth continued consuming alcoholic beverages. According to Connelly, who was sitting directly across the table from him, with an unobstructed view, Southworth had four (4) twenty four (24) ounce beers with his meal and at least two (2) Jack Daniels Manhattans. He also ate an order of baby back ribs and possibly an appetizer.

19. According to the statement given to the police by Leigh Chabot, a waitress who served the party, Southworth had three (3), not two (2), Jack Daniels Manhattans.

20. According to testimony by Connelly and the Longhorn audit report of that date, reflecting food and beverages believed served to the Southworth group, and referred to as Exhibit 5 in Item 8 above, the Southworth party of six were seated at Table 52 and placed orders for food and drinks (that were recorded on check 20043) as follows:

8:40 pm Appetizers, three Jack Daniels Manhattans and one 25 oz. Bud Light. (check 20043)

9:00 pm Food (including 3 orders of a ½ rack of ribs), salads, French fries (check 20043).

(According to Jude Connelly (Item 18 above) one order of the ribs would have been for Jeffrey Southworth).

9:15 pm 25 oz Bud Light (check 20043)

9:21 pm Four Jack Daniels Manhattans (check 20043)

9:24 pm Three Jack Daniels Manhattans (check 20043)

9:31-9:57 pm print check 20043 six times.

9:57 pm close check 20043 for 202.79

According to the Longhorn audit report, the last drinks were served to Southworth's party at the Longhorn Steakhouse at approximately 9:30 p.m. and the bill was paid at 9:57 p.m. and that six meals and four appetizers were served to table 52.

21. While at the Longhorn Steakhouse, Southworth appeared to be under the influence of the alcoholic beverages he was drinking. According to Connelly, Southworth "didn't hold himself the way he usually did", "was sloppier looking than usual", "not standing straight", "louder than usual" and his "eyes were glassy" (Connelly deposition pp. 49-50).

22. According to Connelly, everyone at the Southworth table was loud. The Southworth party was so loud that evening that either a restaurant manager or waitress was forced to request that the table quiet down. That request was made at approximately 9:30 p.m., at or about the time records indicate service of the last drinks to the table.

23. Michael Espey, another member of Southworth's party that night, started drinking alcoholic beverages at 4:00 or 5:00 in the afternoon. Despite that, in his own words, he was "drunk" (Michael Espey deposition p. 26) while at the Longhorn Steakhouse, he was served at least a Manhattan and a beer.

24. The group left the restaurant at approximately 10:00 p.m. and proceeded to the Four Points Hotel in Leominster. On the ride to the hotel, Southworth sat in the back of his truck with his two rottweiler dogs and Michael Espey. Thomas Espey drove and Connelly sat in front with him. The drive to the hotel took approximately 10-15 minutes. Southworth, Thomas Espey and Connelly were at the hotel for approximately 35-40 minutes. Southworth had a 12-ounce beer from a can at the hotel. This was the last alcoholic beverage Southworth consumed that evening, and the only alcoholic beverage he had after leaving the Longhorn Steakhouse. (Connelly deposition pp. 51-56)

25. Southworth, Thomas Espey and Connelly then proceeded to a nightclub in Leominster known as "The Other Side". As before, Thomas Espey drove. Either leaving the hotel or when the party pulled into the parking lot of The Other Side, Thomas Espey and Connelly had a conversation with Southworth in which they told Southworth that he was "too drunk to drive". The trip took about 10-15 minutes. Although the party originally intended to go into the nightclub, they quickly made a decision not to do so. (Connelly deposition pp. 51-52)

26. Thomas Espey, Connelly and Southworth then proceeded, with Thomas Espey driving, to the apartment parking lot in Littleton where Thomas Espey's motor vehicle was parked. The trip took 20 to 30 minutes. (Connelly deposition pp. 58-59)

27. Because Southworth had too much to drink, Thomas Espey told him to "just sleep in his truck". Southworth refused to do so. Southworth jumped into the front seat of Southworth's Dodge Dakota truck. According to Thomas Espey, Southworth was intoxicated and alone in the vehicle. Southworth, in backing out of the parking lot, drove over Thomas Espey's foot.

28. At approximately ten minutes past midnight on Route 495 in Westford, MA, Southworth crashed his Dodge Dakota truck into the rear of a vehicle driven by Jose Santiago in which his three daughters, Awilda Santiago, Christina Santiago and Veronica Rosario were passengers. Jose and Awilda died. Christina and Veronica were seriously injured in the crash.

29. Southworth was subsequently arrested at approximately 7:10 am at the Residence Inn motel in Westford, MA.

30. A court order to take a blood sample was secured, and his blood was taken at some time after 1:00 pm. Subsequent analysis of that blood showed no alcohol.

Methods

1. Using the data from the Longhorn audit report for 9/26/03, reflecting the alcoholic beverages served to the Southworth group at table 52 and referred to as Exhibit 5 in Item 8 above, and the statements and depositions described in items 12-22 above, I constructed a chronology of the number of beers and Jack Daniels Manhattans consumed by Mr. Jeffrey Southworth from approximately 7:30 pm on 9/26/03 after "dirt biking" through dinner at the Longhorn from 8 pm till 10 pm, but excluding the beer consumed at the Four Points Hotel after leaving the Longhorn.

2. Bud Light beer contains 4.2% ethanol and a 12 oz. beer would contain $0.042 \times 12 = 0.50$ oz. of pure ethanol. A 25 oz beer would contain a little more than twice as much as a 12 oz beer or approximately 1.0 oz. of pure ethanol.

3. A standard recipe for a Manhattan is: 1 ½ oz. of bourbon, rye or whiskey and ¾ oz. of sweet vermouth. Jack Daniels is approximately 80 proof (40%) and sweet vermouth is approximately 32 proof (16%).

4. The Widmark Formula is:

$$\text{BAC} = \frac{(\text{Specific Gravity Blood}) (\text{Sp.G. Ethanol}) (\text{Grams of Ethanol})}{(\text{Body Weight in kilograms}) (\text{Widmark } r)} - \frac{\text{Total Widmark } \beta}{(\text{Amt of ETOH burnt off})}$$

Opinions

1. Based upon my education, experience, training and review of the materials and facts detailed above, I have arrived at various opinions concerning Southworth and the events of September 26-27, 2003, all as set out below. Each of those opinions is held to a reasonable degree of scientific certainty.

2. Based upon the calculations I have done using the Widmark formula set forth above and assuming that Jeffrey Southworth weighed 210 lbs. and consumed a 25 oz Bud Light beer containing approximately 30 grams of ethanol, that he was not obese and that his height of 6' 4" was in reasonable proportion to his weight, I conclude that each beer 25 oz beer consumed on an empty stomach produced a Blood Alcohol Concentration (BAC) of approximately 0.016% 30 minutes later. Having calculated the amount of ethanol in the Jack Daniels Manhattan to be approximately 72% of the ethanol content of the 25 oz beer, I further conclude that each Jack Daniels Manhattan would produce a BAC of approximately 0.012% 30 minutes later. In these calculations, I used a Widmark β , or "burn off" rate of 0.02% per hour, which is a little faster than the true Widmark average "burn off" rate of 0.017% per hour. Use of the higher burn off rate would cause my calculations to under-estimate the BAC and would be more favorable towards the defendant establishment in this case.

3. Based upon the consumption of alcohol described above, the observations of

Southworth by members of his group and the other events of that evening, I calculate that Jeffrey Southworth, if he consumed four 25 oz beers at the table, had a BAC of approximately 0.22% at 9:30 pm, the approximate time he was served his last drink. I calculate that if he consumed two 25 oz beers at the table Mr. Southworth had a BAC of over 0.18% at 9:30 pm, the approximate time he was served his last drink.

4. I am also of the opinion, to a reasonable degree of scientific certainty, that 95% of non-alcoholic individuals with a BAC over 0.20%, and 89% of individuals with a BAC between 0.15% and 0.20%, show visible signs of intoxication.

5. Based upon the consumption of alcohol described above, my calculations, the testimony of the fact witness, Jude Connelly that, at that time, Southworth appeared to him to be under the influence and the data cited in #4 above, I am of the opinion, to a reasonable degree of scientific certainty, that Jeffrey Southworth was intoxicated and exhibiting visible signs of intoxication at the Longhorn Steakhouse at the time of the service of the last drink to him.

6. Connelly's observations were that Southworth didn't hold himself the same way he usually did (i.e., was not standing straight), was sloppier than usual, was louder than usual (Southworth was generally quiet and did not speak until spoken to), indeed so loud that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy.

7. I also base this opinion that Southworth was exhibiting visible signs of intoxication on the rate of consumption of the drinks the Longhorn served and that Southworth consumed. Although there are differences among the fact witness as to how many beers were served to/consumed by Southworth, the Longhorn audit report shows that Southworth's table was

served at least two (2) 25 oz beers plus the two (2) he consumed prior to being seated. A statement by waitress Leigh Chabot indicated that Southworth was served three (3) Jack Daniels Manhattans at the Longhorn Steakhouse for a total of at least four (4) "double-sized" beers and three (3) Jack Daniels Manhattans, all between 8:00 p.m. arrival and 9:30 pm, approximately 1 1/2 hours time. As stated in opinion 2 above, the true Widmark average "burn off" rate is 0.017% per hour, a rate sufficient to burn off one 12 oz beer in an hour in a man, independent of body mass. Even considering Mr. Southworth's large body mass of 210 lbs, he would be able to burn off only one half of a 25 oz beer in an hour.

8. Based on the fact that even with Mr. Southworth's large body mass of 210 lbs, he would be able to burn off only one half of a 25 oz beer in an hour, to serve him up to nine (9) drinks in 1 1/2 hours, or a rate of service of 6 drinks per hour, the Longhorn Steakhouse personnel had to know that he would accumulate the ethanol in all drinks above one half of a 25 oz beer per hour and that his BAC would rapidly rise, due to the rapid rate of service and consumption of ethanol.

9. It is a scientific fact that an individual reaches a point when his/her enzymes that metabolize ethanol become saturated and cannot metabolize any greater amount of ethanol. The result is that the ethanol accumulates in the blood and causes an increasing level of intoxication as the rate of consumption and absorption exceeds its rate of metabolism and elimination. This is called a "kinetic bottle-neck" and is similar to pouring water into a funnel. You can pour more water in or pour it at a faster rate, but the water will only come out of the funnel at the same rate all the time, due to the fixed size of the opening on the stem of the funnel. As more water is poured into the funnel it accumulates. This is a "kinetic bottle-neck".

10. I am familiar with the scientific calculation of the amount of ethanol contained in an alcoholic beverage. Among professionals in my field, a standard drink of alcoholic beverage is generally accepted as consisting of 12 ounces of domestic beer containing approximately 4.2% ethanol, 4 ounces of table wine containing 12% ethanol, or 1.25 ounces of 80 proof (40%) distilled spirits, each of which has the same ethanol content as the other two, approximately 0.5 oz or 15 grams.

11. Assuming Southworth consumed four (4) 25 oz beers and three (3) Jack Daniels Manhattans, he consumed the equivalent of at least twelve (12) "standard drinks" (containing 0.5 oz of pure ethanol, as defined in 10 above) over the course of approximately 1 ½ hours between his arrival at Longhorn and his departure, or a rate of 8 drinks per hour. If he in fact consumed six (6) 25 oz beers, that would be equivalent to 15 "standard drinks" in 1 ½ hrs or a rate of 10 drinks per hour.

12. In performing these calculations I have assumed that a 25 ounce beer contains one ounce of pure ethanol and that a Jack Daniels Manhattan contains 0.72 ounces ethanol. Should further evidence become available regarding the formula or recipe for the Jack Daniels Manhattan, I will re-do my calculations according to the newly discovered data.

13. Although there is considerable variability among individuals depending upon their experience with ethanol and their development of tolerance and/or coping skills to the effects of ethanol, in my experience, and according to published studies which form the basis of the standard of care in the forensic toxicology community, an individual with a BAC of over 0.15% will demonstrate visible signs of intoxication. All of the many signs of intoxication are not present in every individual. Even in individuals with a high degree of tolerance, at least 3 of 4

people with BACs greater than 0.20% showed some signs of intoxication.

14. According to the results of seven studies, compiled by the American Medical Association and published in 1968 and the table attached hereto as Exhibit 1, from the study "Alcohol and the impaired driver", Chapter 11, Acute Alcohol Intoxication, 89% of individuals with BACs between .0151 and .20 are acutely intoxicated and visibly drunk, and 95% of persons with BACs of between .201 and .25 are acutely intoxicated and visibly drunk.

15. As stated in opinion 3 above, Mr. Southworth had a calculated BAC of at least 0.20% at the time he was served his last drink, approximately 9:30 pm. As an experienced drinker with some degree of tolerance it is my opinion, based on these calculations, the studies cited above in items 14 and 15, and particularly as buttressed by Mr. Connelly's observations (item 6 above), that Mr. Southworth would not have been able to mask all the signs of intoxication with a Blood Alcohol Content of .20% or above and did in fact exhibit visible signs of intoxication. Once again, Connelly's observations were that Southworth didn't hold himself the same way he usually did, was sloppier than usual, was not standing straight, was louder than usual, and that the management of the Longhorn Steakhouse needed to request that he and the rest of the party quiet down, and that his eyes were glassy. Not standing straight is caused by the central nervous system (CNS) depressant effects of ethanol which causes sensory-motor incoordination, which is manifested as weakness, lethargy, and muscle relaxation and, in individuals consuming large quantities of ethanol, are visible signs of alcohol intoxication. Loudness or boisterous behavior is caused by ethanol's ability to decrease inhibitions and diminish an individual's judgment and self-control.

16. Based upon the above facts and assumptions, it is my opinion that Southworth had

the following BACs at the following times relevant to this matter:

At approximately 9:30 p. m., when served his last drink at the Longhorn Steakhouse, his BAC was approximately 0.18% - 0.22%;

At approximately 10:00 p.m., when the party left the Longhorn Steakhouse, his BAC was approximately 0.23%-0.26%;

At approximately 10:45 p.m., when he consumed a twelve (12) ounce beer at the Four Points Hotel in Leominster, his BAC was approximately 0.23%-0.26%;

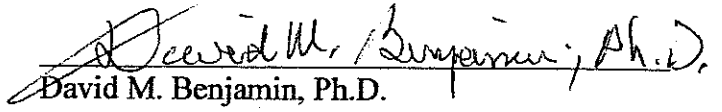
At approximately 12:10 a.m. on September 27, 2003, at the time of the accident, his BAC was approximately 0.23%-0.25%.

17. In my opinion, Southworth's BAC of 0.23%-0.25% at the time of the accident was a direct and proximate result of the alcoholic beverages he consumed at the Longhorn Steakhouse less a contribution of approximately 0.008% from the 12 oz beer at the Four Points Hotel in Leominster.

18. In my opinion, Southworth's BAC of 0.23%-0.25% at the time of the accident was a substantial contributing factor and proximate cause of the accident in which two persons were killed and two others seriously injured.

19. As numerous studies have concluded, and my personal experience confirms, that a person with a BAC over 0.20% in a confusional stage of intoxication, marked by disorientation, mental confusion, loss of critical judgment, sensory-motor incoordination, dizziness, disturbances of vision and perception of colors, form, motion and dimensions and increased muscular in-coordination, all of which affect the ability of a person to operate a motor vehicle.

Signed under the pains and penalties of perjury this 4th day of May, 2005.

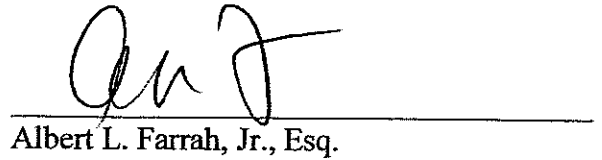

David M. Benjamin, Ph.D.

CERTIFICATE OF SERVICE

SUFFOLK, SS

May 12th 2005
11:00pm

A copy of the Affidavit of David Benjamin, Ph.D. was today mailed hand delivered to Brian Voke, Esq., Campbell, Campbell, Edwards & Conroy, One Constitution Plaza, Boston, MA 02129.


Albert L. Farrah, Jr., Esq.

E Z - A L C V2.0

C A L C U L A T E D

B L O O D A L C O H O L C O N C E N T R A T I O N C H A R T

Client Name - - - - -Southworth
Body Weight - - - - -210 POUNDS.
Burnoff Rate - - - - -.020% PER HOUR.
Widmark 'r' Factor- - - -.68
Initial BAC Level - - - -.0000% AT TIME OF DRINK 1

B L O O D A L C O H O L C O N C E N T R A T I O N (% W/

[illegible]

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